No. 09-

IN THE

Supreme Court of the United States

CALIFORNIA STATE REPUBLICAN LEGISLATOR INTERVENORS, *et al.*,
Appellants,

v.

MARCIANO PLATA AND RALPH COLEMAN, *et al.*,
Appellees.

On Appeal from an Order of the Three-Judge Court in the United States District Courts for the Northern District of California and the Eastern District of California

JURISDICTIONAL STATEMENT

ROD PACHECO
DISTRICT ATTORNEY, COUNTY OF RIVERSIDE
WILLIAM E. MITCHELL,
ASSISTANT DISTRICT ATTORNEY
ALAN D. TATE
SENIOR DEPUTY DISTRICT ATTORNEY
4075 Main Street, 1st Floor
Riverside, CA 92501
(951) 955-5484
Counsel for Appellants District Attorney Intervenors

STEVEN S. KAUFHOLD *
CHAD A. STEGEMAN
AKIN GUMP STRAUSS HAUER & FELD LLP
580 California Street
Suite 1500
San Francisco, CA 94104
(415) 765-9500
Counsel for Appellants Republican Assembly and Senate Intervenors

MARTIN J. MAYER
KIMBERLY HALL BARLOW
IVY M. TSAI
JONES & MAYER
3777 North Harbor Blvd.
Fullerton, CA 92835
(714) 446-1400
Counsel for Appellants Sheriff, Chief Probation Officer, Police Chief, and Corrections Intervenors

* Counsel of Record

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QUESTIONS PRESENTED

1. Whether the three-judge court properly determined that crowding was the statutory primary cause of continuing violation of prisoners' constitutional rights, and that no remedy existed other than a prisoner release order pursuant to the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626 where the court simply assumed the continuing existence of violations based on determinations made years prior, refused to hear evidence regarding current prison conditions at the time of trial and disregarded evidence that constitutional levels of care could be achieved at the current prison population level.

2. Whether the system-wide prisoner release order ("Prisoner Release Order") issued by the three-judge court "is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right" in compliance with the PLRA, 18 U.S.C. § 3826(a)(1)(A).

3. Whether the three-judge court properly gave "substantial weight to any adverse impact on public safety or the operation of a criminal justice system" in ordering a reduction of approximately 46,000 inmates within two years in light of the existing seventy percent recidivism rate for inmates in California and the lack of any mechanism in the Prisoner Release Order to mitigate the effect of the ordered release.

PARTIES TO THE PROCEEDING

The California State Republican Senator and Assembly Intervenors (collectively the "Legislator Intervenors") appealing the Three-Judge Court's August 4, 2009 Opinion and Order include the following California State Senators: Senators Samuel Aanestad, Roy Ashburn, James F. Battin, Jr., John J. Benoit, Dave Cogdill, Robert Dutton, Dennis Hollingsworth, Bob Huff, Abel Maldonado, George Runner, Tony Strickland, Mimi Walters and Mark Wyland; and the following California Assemblymembers: Michael N. Villines, Anthony Adams, Joel Anderson, Tom Berryhill, Sam Blakeslee, Paul Cook, Chuck DeVore, Michael D. Duvall, Bill Emmerson, Jean Fuller, Ted Gaines, Martin Garrick, Shirley Horton, Guy S. Houston, Kevin Jeffries, Rick Keene, Doug La Malfa, Bill Maze, Roger Niello, Sharon Runner, Jim Silva, Cameron Smyth, Todd Spitzer, Audra Strickland, and Van Tran.

The District Attorney intervenors appealing the Three-Judge Court's August 4, 2009 Opinion and Order include the following: Rod Pacheco, District Attorney County of Riverside, Bonnie M. Dumanis, District Attorney County of San Diego, Tony Rackauckas, District Attorney County of Orange, Jan Scully, District Attorney County of Sacramento, Christie Stanley, District Attorney County of Santa Barbara, Michael A. Ramos, District Attorney County of San Bernardino, Robert J. Kochly, District Attorney County of Contra Costa, David W. Paulson, District Attorney County of Solano, Gregg Cohen, District Attorney County of Tehama, Todd Riebe, District Attorney County of Amador, Bradford R. Fenocchio, District Attorney County of Placer, John R. Poyner, District Attorney County of Colusa,

Michael Ramsey, District Attorney County of Butte, Gerald T. Shea, District Attorney County San Luis Obispo, Edward R. Jagels, District Attorney County of Kern, Gregory Totten, District Attorney County of Ventura, Vern Pierson, District Attorney County of El Dorado, Clifford Newell, District Attorney County of Nevada, Ronald L. Calhoun, District Attorney County of Kings, and Donald Segerstrom, District Attorney County of Tuolumne.

The Sheriff, Police Chief, Probation Chief and Corrections Intervenors appealing the Three-Judge Court's August 4, 2009 Opinion and Order include the following: Amador County Sheriff-Coroner Martin Ryan, Butte County Sheriff Perry Reniff, Calaveras County Sheriff Dennis Downum, El Dorado County Sheriff Jeff Neves, Fresno County Sheriff Margaret Mims, Glenn County Sheriff Larry Jones, Inyo County Sheriff William Lutze, Kern County Sheriff Donny Youngblood, Lassen County Sheriff Steve Warren, Los Angeles County Sheriff Lee Baca, Merced County Sheriff Mark Pazin, Mono County Sheriff Rick Scholl, Monterey County Sheriff Mike Kanalakis, Orange County Sheriff-Coroner Sandra Hutchens, Placer County Sheriff Edward Bonner, San Benito County Sheriff-Coroner Curtis Hill, San Diego County Sheriff William Gore, San Joaquin County Sheriff-Coroner Steve Moore, San Luis Obispo County Sheriff Pat Hedges, Santa Barbara County Sheriff Bill Brown, Santa Clara County Sheriff Laurie Smith, Solano County Sheriff-Coroner Gary Stanton, Stanislaus County Sheriff-Coroner Adam Christianson, Sutter County Sheriff-Coroner J. Paul Parker, Tehama County Sheriff Clay Parker, Tuolumne County Sheriff-Coroner James Mele, Ventura County Sheriff Bob Brooks, Yolo County Sheriff Ed Prieto, Yuba County Sheriff Steve

Durfor, City of Fremont Police Chief Craig Steckler, City of Fresno Police Chief Jerry Dyer, City of Grover Beach Police Chief Jim Copsey, City of Modesto Police Chief Michael Harden, City of Pasadena Police Chief Bernard Melekian, City of Paso Robles Police Chief Lisa Solomon, City of Roseville Police Chief Michael Blair, Contra Costa County Chief Probation Officer Lionel Chatman, Fresno County Chief Probation Officer Linda Penner, Mariposa County Chief Probation Officer Gail Neal, Sacramento County Chief Probation Officer Don Meyer, San Luis Obispo Chief Probation Officer Jim Salio, Solano County Chief Probation Officer Isabelle Voit, Stanislaus County Chief Probation Officer Jerry Powers, and Ventura County Chief Probation Officer Karen Staples.

Plaintiffs Below:

Gilbert Aviles
Steven Bautista
Ralph Coleman
Paul Decasas
Raymond Johns
Joseph Long
Clifford Myelle
Marciano Plata
Leslie Rhoades
Otis Shaw
Ray Stoderd
California Correctional Peace Officers' Association, intervenor-plaintiff

District Court Defendants, and Appellants in Related Proceeding, Case No. 09-A234:

Governor Arnold Schwarzenegger
Matthew Cate, Secretary of the California Department of Corrections and Rehabilitation
John Chiang, California State Controller
Michael Genest, Director of the California Department of Finance

Stephen W. Mayberg, Director of the Department of Mental Health

Other Intervenor-Defendants Below:

County of San Mateo
County of Santa Barbara
County of Santa Clara
County of Solano
County of Sonoma

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	ix
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED IN THE CASE	2
STATEMENT OF THE CASE	2
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	7
I. THE PRISONER RELEASE ORDER SHOULD NOT HAVE BEEN ISSUED BECAUSE THERE WAS NO SHOWING THAT PAST VIOLATIONS WERE CURRENT AND ONGOING AND BECAUSE ALTERNATIVE REMEDIES EXISTED	8
II. THE PRISONER RELEASE ORDER FAILS TO SATISFY THE PLRA'S REQUIREMENT THAT ANY SUCH RELIEF BE BOTH NARROWLY DRAWN AND THE LEAST INTRUSIVE MEANS TO REMEDY VIOLATION OF THE FEDERAL RIGHT	11

TABLE OF CONTENTS—Continued

Page

III. THE PRISONER RELEASE ORDER VIOLATES THE PLRA BECAUSE IT NOT ONLY FAILS TO GIVE SUBSTANTIAL WEIGHT TO ANY ADVERSE IMPACT ON PUBLIC SAFETY, IT AFFIRMATIVELY THREATENS PUBLIC SAFETY. 14

CONCLUSION 18

APPENDIX 1a

TABLE OF AUTHORITIES

CASES Page

California State Republican Legislator Intervenors, et al. v. Marciano Plata and Ralph Coleman, et al., Case No. 09-___ ... 2

Castillo v. Cameron County,Tex., 238 F.3d 339 (5th Cir. 2001) ... 6

Coleman v. *Schwarzenegger, Plata v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH, 2009 WL 2430820 (E.D. Cal/N.D. Cal. Aug. 4, 2009) ... *passim*

Gilmore v. California, 220 F.3d 987 (9th Cir. 2000) ... 6

Governor Arnold Schwarzenegger,et al. v. Marciano Plata and Ralph Coleman, et al., Case No. 09-416 ... *passim*

Hines v. Anderson, 547 F.3d 915 (8th Cir. 2008) ... 13

Lewis v. Casey, 518 U.S. 343 (1996) ... 6

Miller v. French, 530 U.S. 327 (2000) ... 6

Missouri v. Jenkins, 515 U.S. 70 (1995) ... 13

Procunier v. Martinez, 416 U.S. 396 (1974) ... 6

Taylor v. United States, 181 F.3d 1017 (9th Cir. 1999) ... 6

Thornburgh v. Abbott, 490 U.S. 401 (1989) ... 6

Woodford v. Ngo, 548 U.S. 81 (2006) ... 6

STATUTES

18 U.S.C. § 3626 ... *passim*

28 U.S.C. § 1253 ... 2

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

141 Cong. Rec. S14408-01, S14414 (1995)..... 6
141 Cong. Rec. S14418 (1995)..... 15
141 Cong. Rec. S2648-02, S2649 (1995) 6
H.R. Rep. No. 104-21 (1995)..... 10, 15

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion from the three-judge court's August 4, 2009 Opinion and Order (Docket No. 2197 in C 01-1351 TEH; Docket No. 3641 in S-90-0520-LKK-JFM P) is not yet reported in an official publication. It may be found at 2009 WL 2430820 (E.D. Cal/N.D. Cal. Aug. 4, 2009). It is reprinted in the Appendix at 1a-256a.[1]

[1] Citations to the "Appendix," or "App." in abbreviated format, refer to citations to the appellants' appendix to their jurisdictional statement filed with this Court on October 5, 2009, in

JURISDICTION

The three-judge court's Order and Opinion was entered on August 4, 2009. App. 1a-256a. It granted injunctive relief pursuant to the Prison Litigation Reform Act, 18 U.S.C. § 3626. The California State Republican Legislator Intervenors, the District Attorney Intervenors, and the Sheriff, Police Chief, Probation Chief, and Corrections Intervenors filed their notices of appeal on September 3, 2009. Int. App. 1a-5a. The jurisdiction of this Court rests on 28 U.S.C. § 1253, providing for a direct appeal from decisions of three-judge courts.

STATUTORY PROVISIONS INVOLVED IN THE CASE

This appeal concerns interpretation and application of the Prison Litigation Reform Act, 18 U.S.C. § 3626. The relevant provisions are reproduced at App. 356a-358a.

STATEMENT OF THE CASE

The plaintiffs in the class action lawsuits *Plata v. Schwarzenegger*, involving claims of constitutionally inadequate provision of medical care in California state prisons, and *Coleman v. Schwarzenegger*, involving claims of constitutionally inadequate provision of mental health care in California state prisons, moved to convene a three-judge court to consider the issuance of a prisoner release order pursuant to the Prison Litigation Reform Act, 18

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the related matter *Governor Arnold Schwarzenegger, et al. v. Marciano Plata and Ralph Coleman, et al.*, Case No. 09-416. Citations to the appendix attached to the present jurisdictional statement will be noted as the "Intervenors' Appendix" or "Int. App." in abbreviated format.

U.S.C. § 3626 ("PLRA"). The courts had previously determined that the then California Department of Corrections and Rehabilitation ("CDCR") did not provide prison inmates with constitutionally adequate medical and mental health care, respectively. To remedy these constitutional violations, the *Coleman* court appointed a special master ("Special Master") to oversee development and implementation of a plan to remedy the unconstitutional provision of mental health care, App. 36a, and in early 2006, the *Plata* court appointed a receiver ("Receiver") to take control of all aspects of the CDCR relating to the provision of medical care and to bring the CDCR into constitutional compliance. App. 29a-30a. District Court Judges Henderson and Karlton granted the respective plaintiffs' motions to convene a three judge court on July 23, 2007. *See* App. 62a-69a, *see also* App. 273a-287a, 288a-304a. Then Chief Judge Mary M. Schroeder of the United States Court of Appeals for the Ninth Circuit appointed Judge Stephen Reinhardt, Judge Karlton, and Judge Henderson to the panel. *See id.*

Shortly after the appointment of the three-judge court, Appellants moved to intervene as of right in the proceedings, which motions the three-judge court granted. *See* App. 69a.

To issue a prisoner release order pursuant to the PLRA, a properly convened[2] three-judge court must

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[2] A plaintiff must establish two prerequisites to properly convene a three-judge court pursuant to the PLRA. First, a district court must have entered an order for less intrusive relief, which relief failed to remedy the violation of the federal right sought to be remedied through the prisoner release order. Second, the defendant must have had a reasonable amount of time to comply with previous court orders. 18 U.S.C.

find "by clear and convincing evidence that—(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E).

The PLRA further mandates that prospective relief may be afforded only when it is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). In fashioning the relief, the three-judge court must "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system cause by the relief." *Id.* Implicit in the directive that relief be narrowly tailored and weighed against potential adverse effects is the underlying recognition of the existence of present and ongoing constitutional violations, and that relief beyond what is required unnecessarily impacts public safety and the criminal justice system.

Trial commenced on November 18, 2008, with final oral argument concluding on February 3 and 4, 2009. The three-judge court determined, in an opinion and order dated August 4, 2009, that overcrowding was the primary cause of the constitutionally inadequate provision of medical and mental health care and that

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§ 3626(a)(3)(A). Defendants in the three-judge court proceedings challenge the propriety of the three-judge court's jurisdiction on the grounds that plaintiffs did not establish these two essential requirements (*see generally* Jurisdictional Statement, *Governor Arnold Schwarzenegger, et al. v. Marciano Plata and Ralph Coleman, et al.*, Case No. 09-416), and Appellants reserve the right to comment on this challenge should the appellate proceedings be consolidated.

no other relief could remedy the violations. *See* App. 78a-165a. Accordingly, the three-judge court issued the relief requested by the plaintiffs, namely, a prisoner release order (the "Prisoner Release Order").

The Prisoner Release Order issued by the three-judge court requires a population reduction of approximately 46,000 inmates in the California prison system, or a "population cap" of 137.5% of the correctional system's "design capacity," within two years. In doing so, the three-judge court concluded that the order was narrowly drawn, extended no further than necessary, was the least intrusive means to remedy the constitutional violations and that "substantial weight" had been given to any adverse impact on public safety or the operation of California's criminal justice system caused by the relief ordered. *See* App. 185a-255a.

The issuance of such an extreme and unprecedented prisoner release order gravely threatens public safety in California. Worse still, the mass release order may be entirely unnecessary for two independent reasons. First, the three-judge court simply assumed that constitutional violations indentified years prior to issuance of the Prisoner Release Order continued unabated, and refused to permit evidence at trial to the contrary. Second, even if such violations did exist at the time of trial, no release order was necessary in light of the public statements of the court-appointed Receiver and the testimony of plaintiffs' own expert, that constitutional levels of care could be achieved at the current population level. In sum, this Prisoner Release Order is exactly the type of overreaching and overbroad remedy that Congress sought to curtail when it enacted the PLRA.

This Court recognized well in advance of the PLRA that federal courts are ill-equipped to entangle themselves in the operation of state prison systems. Management of state prisons is "peculiarly within the province of the legislative and executive branches of government. . . ." *Procunier v. Martinez*, 416 U.S. 396, 405 (1974), overruled on other grounds by *Thornburgh v. Abbott*, 490 U.S. 401 (1989). "[C]ourts are ill equipped to deal with the increasingly urgent problems of the prison administration and reform." *Id.*; *see also Lewis v. Casey*, 518 U.S. 343, 364 (1996) (Thomas, J., concurring) ("too frequently, federal district courts in the name of the Constitution effect wholesale takeovers of state correctional facilities and run them by judicial decree.").

Congress agreed and enacted the PLRA to further restrain judicial interference with the management of state prisons. "When Congress enacted the PLRA, it sought to oust the federal judiciary from day-to-day prison management." *Taylor v. United States*, 181 F.3d 1017, 1027 (9th Cir. 1999) (*en banc*) (Wardlaw, J., dissenting); *see also Woodford v. Ngo*, 548 U.S. 81, 93 (2006) ("The PLRA attempts to eliminate unwarranted federal-court interference with the administration of prisons. . . ."); *Miller v. French*, 530 U.S. 327, 347 (2000) ("The PLRA has restricted courts' authority to issue and enforce prospective relief concerning prison conditions. . . ."). Congress was particularly skeptical and demanded higher scrutiny of population caps and prisoner release orders such as the one ordered by the three-judge court below. *See Castillo v. Cameron County*, Tex., 238 F.3d 339, 348 (5th Cir. 2001) (noting that the legislative history of the PLRA reveals Congress' apprehension regarding population caps); *Gilmore v. California*, 220 F.3d 987, 998 & n.14 (9th Cir. 2000) (same); 141 Cong.

Rec. S14408-01, S14414 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) ("Perhaps the most pernicious form of judicial micromanagement is the so-called prison population cap."); 141 Cong. Rec. S2648-02, S2649 (daily ed. Feb. 14, 1995) (statement of Sen. Huchinson) ("This bill will curb the ability of Federal Courts to take over the policy decisions of State prisons. . . .")

This appeal presents substantial questions regarding when a federal court has the authority to issue a prisoner release order and what the proper scope of any such order should be. The Prisoner Release Order issued below is the first such order made over a defendant's objection since enactment of the PLRA. The unprecedented nature and extraordinary scope of the order, as well as the public importance of settling disputes regarding the interpretation and the application of the PLRA, make it particularly appropriate for this Court to note probable jurisdiction.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This appeal will determine whether the California prison population will be reduced by the release or non-incarceration of tens of thousands of duly arrested, convicted and sentenced criminals, and what impact such an order would have on millions of law-abiding California residents. The appellant intervenor-defendants—police chiefs, sheriffs, probation officers, district attorneys and legislators from across California—joined this litigation for the express purpose of opposing such a system-wide "prisoner release order" and protecting public safety.

Together, the Appellants represent millions of California citizens. On behalf of those citizens, and the

millions more Americans who will be placed at risk of unnecessary and overbroad prisoner release orders if the order of the three-judge court below gains precedential value, we urge this Court to note probable jurisdiction for the following reasons:

I. THE PRISONER RELEASE ORDER SHOULD NOT HAVE BEEN ISSUED BECAUSE THERE WAS NO SHOWING THAT PAST VIOLATIONS WERE CURRENT AND ONGOING AND BECAUSE ALTERNATIVE REMEDIES EXISTED.

Under the PLRA, a three-judge court "shall enter a prisoner release order only if the court finds by clear and convincing evidence that—(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E). For the following reasons, the Prisoner Release Order issued below fails to satisfy either requirement.

The PLRA is written in the present tense and permits issuance of prospective prisoner release orders only to correct current and ongoing violations of federal rights, not to provide a remedy to plaintiffs to compensate them for past wrongs. Notwithstanding this fact, the three-judge court precluded the introduction of evidence and argument on the issue of whether past violations were "current and ongoing" at the time of the trial. App. 78a n.42; *see also* App. 77a. Instead of determining whether any current violations existed, the three-judge court's analysis focused only on "whether . . . requiring a reduction in the population of California's prisons was necessary to remedy the previously identified constitutional violations[.]" App. 77a.

As a result, by the time the Prisoner Release Order issued on August 4, 2009, no determination had been made regarding alleged violations since July 2007. App. 77a. Indeed, neither the *Coleman* nor the *Plata* single-judge courts had held evidentiary hearings regarding the state of the prisons and ongoing violations since September 13, 1995 (*Coleman*) and June 9, 2005 (*Plata*). *See* App. 23a, 33a. Had the three-judge court permitted such evidence and argument at trial, the appellant intervenor-defendants, as well as the State defendants, would have provided compelling evidence regarding massive increases in spending and the allocation of resources, resulting in substantial overall improvements in care. *See, e.g.*, Pre-Trial Hr'g Tr. at 28:16-29:2 (E.D. Cal./N.D. Cal. Nov. 10, 2008) (*Coleman* Docket No. 3541.1; *Plata* Docket No. 1786); Trial Tr. at 6:24-7:9, 57:11-58:13 (E.D. Cal./N.D. Cal. Nov. 18, 2008) (*Coleman* Docket No. 3541.2; *Plata* Docket No. 1829). At a minimum, an understanding of the current nature of any constitutional violations should have affected the three-judge court's determination as to the scope of the order and the depth of the intrusion into state affairs the court deemed necessary. Reliance on stale evidence to craft prospective remedial relief as drastic as the Prisoner Release Order here, ignores the intent of the PLRA and, as discussed below, the statutory and common law mandate that the relief afforded only go as far as necessary.

Second, and equally important, the three-judge court ignored evidence from its own court-appointed Receiver and Special Master, as well as plaintiffs' expert that a prisoner release order was not necessary to achieve and maintain constitutional levels of care. Specifically, the *Plata* Receiver stated that under his control, the California prison systems could

provide constitutional levels of care regardless of population. He stated in a public address that "I'm just not seeing difficulty in providing medical services no matter what the population is." Trial Declaration of Assemblymember Todd Spitzer, ¶ 28 and Exhibit D thereto, at 30:00 minutes (E.D. Cal./N.D. Cal. Oct. 30, 2008) (*Coleman* Docket No. 3173; Plata Docket No. 1656). The Receiver continued, stating "we believe we can provide constitutional levels of care no matter what the population is." *Id.* at 31:20 minutes. Similarly, the *Coleman* Special Master acknowledged that "even the release of 100,000 inmates would likely leave the defendants with a largely unmitigated need to provide intensive mental health services to program populations that would remain undiminished" and releasing even 50,000 inmates would not bring the staffing resources into compliance. App. 157a-158a. Finally, plaintiffs' expert, Dr. Shansky, testified that California could provide constitutionally adequate care for more than 172,000 inmates if other reforms were implemented. Shansky Dep. at 144:3-14 (Dec. 10, 2007); *see also* Trial Tr. at 491:19-492:08 (E.D. Cal./N.D. Cal. Nov. 21, 2008) (*Coleman* Docket No. 3541.5; *Plata* Docket No. 1840) (Dr. Shansky admits that additional changes beyond those set forth in the Receiver's "Turnaround Plan" (*Plata*, No. C01-1351-TEH (N.D.Cal. June 6, 2008) (Docket No. 1229)) were not needed to bring the CDCR's provision of medical care into compliance, and that the "Turnaround Plan" did not envision a population reduction).

With the passage of the PLRA, Congress intended a prisoner release order be "the remedy of last resort." H.R.Rep. No. 104-21, at 25 (1995). Based on the evidence above, there can be little doubt that the Prisoner Release Order was not the remedy of last resort, and that the three-judge court erred when it

held that no alternative to a prisoner release order existed.[3]

II. THE PRISONER RELEASE ORDER FAILS TO SATISFY THE PLRA'S REQUIREMENT THAT ANY SUCH RELIEF BE BOTH NARROWLY DRAWN AND THE LEAST INTRUSIVE MEANS TO REMEDY VIOLATION OF THE FEDERAL RIGHT.

Under the PLRA, any prisoner release order issued by a three-judge court is valid only if the order "is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3826(a)(1)(A). The Prisoner Release Order here fails in at least four respects.

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[3] Moreover, the three-judge court improperly rejected a number of viable alternatives to a prisoner release order on the grounds that such alternatives were too speculative or would take too long to implement. App. 145a-162a. One such alternative was the possibility of transferring California inmates to out-of-state facilities. App. 159a-161a. The three-judge court rejected the alternative because "we conclude that the transfer of inmates to out-of-state facilities would not on its own begin to provide an adequate remedy for the constitutional deficiencies in the medical and mental health care provided to California inmates." App. 161a. Ironically, the three-judge court then issued the Prisoner Release Order while acknowledging that such an order would not necessarily correct current Constitutional violations, if any. App. 134a, 143a. Although it appears the three-judge court has determined a prison population reduction alone will not remedy any asserted constitutional violation, at minimum, additional out-of-state transfers and transfers to federal custody should have been ordered prior to issuance of a system-wide prisoner release order in order to protect public safety in California.

First, because the three-judge court refused to hear evidence or argument regarding whether constitutional violations continued at the time of trial, the resulting Prisoner Release Order was not narrowly tailored to the correction of then-current violations, if any. This is particularly true because the Prisoner Release Order was issued another six months after trial, more than two years since there had been any determination that conditions in the California prison system violated any Federal right, and many years since the last evidentiary hearings on the existence of constitutional violations. Accordingly, the remedy ordered goes far beyond anything necessary or reasonable in light of the conditions as they currently exist.

Second, the Prisoner Release Order is overbroad because it requires a system-wide reduction in California's inmate population and is not targeted at correcting possible violations of the federal rights of members of the *Coleman* and *Plata* plaintiff classes. Indeed, the three-judge court acknowledges that the Prisoner Release Order, if implemented, "is likely to affect inmates without medical conditions or serious mental illness." App. 172a. Citing with approval plaintiffs' expert Dr. Pablo Stewart, the three-judge court acknowledged that a reduction of the prison population by 50,000 inmates would only affect 10,000 *Coleman* class members. App. 238a-239a. 40,000 inmates, or eighty percent of those to be released, would not have suffered a constitutional violation. "[F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation." *Missouri v. Jenkins*, 515 U.S. 70, 98 (1995) (citation omitted). The overwhelming majority of those benefitting from the Prisoner

Release Order are not affected by the purported constitutional violations. For these reasons, the Prisoner Release Order violates the requirement of 18 U.S.C. § 3826(a)(1)(A) that any such relief "extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." *See Hines v. Anderson*, 547 F.3d 915, 922 (8th Cir. 2008) (affirming dismissal of an order under the PLRA that was not tailored to the specific violation at issue because it addressed medical conditions generally rather than "a particular medical issue that existed at the time.").

Third, just as the Prisoner Release Order extends to individuals far beyond the plaintiff classes, it also reaches far beyond the medical and mental health issues that were the basis of the underlying action. Under the PLRA, a narrowly-tailored order would focus directly and exclusively on medical and mental health issues such as staffing ratios, equipment and facilities, and record-keeping. Indeed, the decision of the three-judge court to issue a broad prisoner release order, rather than a more targeted order focused directly and exclusively on medical and mental health care, raises the very real possibility that the Prisoner Release Order will not correct the prior violations. *See* App. 143a ("We recognize that other factors contribute to California's failure to provide its inmates with constitutionally adequate medical and mental health care, and that reducing crowding in the prisons will not, without more, completely cure the constitutional violations the *Plata* and *Coleman* courts have sought to remedy."); App. 157a-158a (noting the Special Master's finding that "even the release of 100,000 inmates would likely leave the defendants with a largely unmitigated need to provide intensive mental health services to program

populations that would remain undiminished"); Receiver's Report re: Overcrowding at 42:24-43:1, *Plata*, No. C01-1351-TEH (N.D. Cal. filed May 15, 2007, Docket No. 673), *available at* http:///www.cprinc.org/docs/court/ReceiverReportReOvercrowding451507.pdf ("those who believe that the challenges faced by the Plan of Action are uncomplicated and who think that population controls will solve California's prison health care problems, are simply wrong.").

Finally, the Prisoner Release Order issued by the three-judge court sets a population cap of 137.5% of the correctional system's "design capacity" to be achieved within two years, without providing a justifiable basis for the percentage chosen, improperly using the archaic and misleading measure of "design capacity" rather than "operational capacity," over an arbitrary time frame, and without any provision for limiting continued population reduction in the event constitutional violations have been resolved at a higher population level. For these reasons, the Court should note probable jurisdiction.

III. THE PRISONER RELEASE ORDER VIOLATES THE PLRA BECAUSE IT NOT ONLY FAILS TO GIVE SUBSTANTIAL WEIGHT TO ANY ADVERSE IMPACT ON PUBLIC SAFETY, IT AFFIRMATIVELY THREATENS PUBLIC SAFETY.

Just as the three-judge court failed to narrowly tailor the Prisoner Release Order to reduce prison population, it also failed meaningfully to consider the adverse impacts on public safety that the order would necessarily cause. 18 U.S.C. § 3626(a)(1)(A); App. 53a, 185a. No prisoner release order should ever issue without appropriate protection of the public. *See* 18 U.S.C. § 3626(a)(1)(A); *see also* H.R. Rep. No. 104-21,

at 9 (1995); 141 Cong. Rec. at S14418 (statement of Sen. Hatch). The three-judge court's order does violence to this important protection contained in the PLRA.

The three-judge court first asserts that a reduction of approximately 46,000 prisoners "could" be accomplished "without a significant adverse impact upon the public safety or the criminal justice system's operation." App. 187a; *see also* App. 201a. At the same time, the order also acknowledges that limiting such negative impacts depends on appropriate programs being "properly implemented." App. 195a, *see also* App. 211a, 215a-216a. Inexplicably, however, the three-judge court fails to order any of the protections that it identifies as necessary to protect public safety. *See* App. 210a ("the CDCR could use risk assessment. . . ."; "The state might also consider implementing. . . ."), 224a ("if a risk assessment instrument were used. . . ."), 233a (leaving it to the state to decide whether to divert resources to fund community rehabilitative programs), 235a (same), 253a ("a failure by the state to comply with the experts' recommendations to take these steps would . . . be contrary to the interests of public safety"). In the end, the three-judge court admits, as it must, that its order cannot be implemented without compromising public safety because "[s]uccessful implementation of such programming will, of course, require space that is currently not available in California's prisons." App. 215a n.80. Moreover, the three-judge court never meaningfully addresses the issue of funding for the programs that it believes are necessary to mitigate the risk of the massive prisoner release.

The three-judge court attempts to downplay the breathtaking risk to the public of its Prisoner Release Order by criticizing the present California prison system as being "criminogenic," asserting that the system itself causes an adverse impact on public safety. *See* App. 188a, 191a-192a. The court cites to expert witness testimony for the notion that "high risk inmates do not rehabilitate and low-risk inmates learn new criminal behavior." App. 190a; *see also* App. 212a ("'with high risk individuals, they don't naturally get better. They gravitate up. So when they come out, they are worse off"). According to the Prisoner Release Order, each year 123,000 or 134,000 offenders are returning to their communities "often more dangerous than when they left," App. 191a (citation omitted), and at least 50 percent of which are released "without the benefit of any rehabilitation programming." App. 199a. Even if the three-judge court's assessment is accurate and incarceration has had a negative effect on many prisoners, it still does not follow that public safety will remain uncompromised by the release of 46,000 "criminogenic" inmates in a two year period. This is particularly true because, as set forth above, the Prisoner Release Order contains no provision to ensure violent and dangerous inmates are not released, to promote rehabilitation and a decrease recidivism, or to protect public safety in any way.

Similarly, the three-judge court also disregarded the opinions of all experts who concluded public safety would be adversely affected by a prisoner release order. *See* App. 193a-194a, 201a, 220a-222a, 233a-234a, 246a-248a. The court's stated reason for doing so was that such opinions were not credible because they did not take into account potential mitigating factors and assumed that prisoners would be

indiscriminately released into the general population. *Id.* But the Prisoner Release Order does not contain any potential protections for the public such as mandatory use of risk assessment tools or creation of local rehabilitative programs. This oversight, together with the refusal of the three-judge court meaningfully to acknowledge the temporal and fiscal realities currently faced by the State of California, virtually assures that the disregarded expert testimony will be proven right and crime will spike in California as a result of the Prisoner Release Order.

More troubling still are the conclusions of the three-judge court that early release of the above-discussed "criminogenic" prisoners will likely reduce recidivism, and that its Prisoner Release Order will not increase the number of crimes committed by those released. *See* App. 201a, 203a. The most the three-judge court will acknowledge is that early release of inmates will permit those released to commit the same crimes at an earlier date. *See* App. 201a. The court's reasoning fails to take into account that inmates released early will have more time in the community to commit additional crimes and also fails to recognize the basic fact that crimes that would not have occurred because of the continued incapacitation of prisoners during their incarceration, will occur if this Prisoner Release Order is implemented and inmates gain early release.

As set forth above, this appeal raises a number of substantial questions worthy of review by this Court. The Prisoner Release Order issued below is unprecedented in size and scope, contrary to the plain language of the PLRA and will unduly endanger California families.

CONCLUSION

The Court should note probable jurisdiction, reverse the determination of the three-judge court, and remand for further proceedings in accordance with guidance from this Court.

Respectfully submitted,

ROD PACHECO
DISTRICT ATTORNEY, COUNTY OF RIVERSIDE
WILLIAM E. MITCHELL,
ASSISTANT DISTRICT ATTORNEY
ALAN D. TATE
SENIOR DEPUTY DISTRICT ATTORNEY
4075 Main Street, 1st Floor
Riverside, CA 92501
(951) 955-5484
Counsel for Appellants District Attorney Intervenors

STEVEN S. KAUFHOLD *
CHAD A. STEGEMAN
AKIN GUMP STRAUSS HAUER & FELD LLP
580 California Street
Suite 1500
San Francisco, CA 94104
(415) 765-9500
Counsel for Appellants Republican Assembly and Senate Intervenors

MARTIN J. MAYER
KIMBERLY HALL BARLOW
IVY M. TSAI
JONES & MAYER
3777 North Harbor Blvd.
Fullerton, CA 92835
(714) 446-1400
Counsel for Appellants Sheriff, Chief Probation Officer, Police Chief, and Corrections Intervenors

* Counsel of Record

November 2, 2009

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
AND THE NORTHERN DISTRICT OF CALIFORNIA
UNITED STATES DISTRICT COURT COMPOSED
OF THREE JUDGES PURSUANT TO
SECTION 2284, TITLE 28 UNITED STATES CODE

[Filed 09/03/2009]

Case No. S-90-0520-LKK-JFM P
THREE-JUDGE COURT

RALPH COLEMAN, *et al.*,
Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, *et al.*,
Defendants.

Case No. C 01-1351 TEH
THREE-JUDGE COURT

MARCIANO PLATA, *et al.*,
Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, *el al.*,
Defendants.

DEFENDANT INTERVENORS'
NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Defendant Legislator Intervenors,[1] District Attorney Intervenors[2] and Sheriff, Police Chief, Probation Chief, and Corrections

---

[1] The California Senator and Assembly Intervenors (collectively the "Legislator Intervenors") appealing the Three-Judge Court's August 4, 2009 Opinion and Order include the following: California State Senators: Senators Samuel Aanestad, Roy Ashburn, James F. Battin, Jr., John J. Benoit, Dave Cogdill, Robert Dutton, Dennis Hollingsworth. Bob Huff, Abel Maldonado, George Runner, Tony Strickland, Mimi Walters and Mark Wyland; and the following California Assemblymembers: Michael N. Villines, Anthony Adams, Joel Anderson, Tom Berryhill, Sam Blakeslee, Paul Cook, Chuck DeVore, Michael D. Duvall, Bill Emmerson, Jean Fuller, Ted Gaines, Martin Garrick, Shirley Horton, Guy S. Houston, Kevin Jeffries, Rick Keene, Doug La Matra. Bill Maze, Roger Niello, Sharon Runner, Jim Silva, Cameron Smyth, Todd Spitzer, Audra Strickland, and Van Tran.

[2] The District Attorney intervenors appealing the Three-Judge Court's August 4, 2009 Opinion and Order include the following: Rod Pacheco, District Attorney County of Riverside, Bonnie M. Dumanis District Attorney County of San Diego, Tony Rackauckas, District Attorney County of Orange, Jan Scully, District Attorney County of Sacramento, Christie Stanley, District Attorney County of Santa Barbara, Michael A. Ramos, District Attorney County of San Bernardino, Robert J. Kochly, District Attorney County of Contra Costa, David W. Paulson, District Attorney County of Solano, Gregg Cohen, District Attorney County of Tehama, Todd Riebe, District Attorney County of Amador, Bradford R. Fenocchio, District Attorney County of Placer, John R. Poyner, District Attorney County of Colusa, Michael Ramsey, District Attorney County of Butte, Gerald T. Shea, District Attorney County San Luis Obispo, Edward R. Jagels, District Attorney County of Kern, Gregory Totten, District Attorney County of Ventura, Vern Pierson, District Attorney County of El Dorado, Clifford Newell, District Attorney County of Nevada, Ronald L. Calhoun, District Attorney County of Kings, and Donald Segerstrom, District Attorney County of Tuolumne.

Intervenors[3] (collectively, the "Statutory Intervenors"), appeal to the Supreme Court of the United States from the Three-Judge Court's August 4, 2009 Opinion and Order (Docket No. 2197 in C 01-1351 TEH

---

[3] The Sheriff, Police Chief, Probation Chief and Corrections Intervenors appealing the Three-Judge Court's August 4, 2009 Opinion and Order include the following: Amador County Sheriff-Coroner Martin Ryan, Butte County Sheriff Perry Rein ff, Calaveras County Sheriff Dennis Downum, El Dorado County Sheriff-Jeff Neves. Fresno County Sheriff Margaret Mims, Glenn County Sheriff Larry Jones, Inyo County Sheriff William Lutze, Kern County Sheriff Donny Youngblood, Lassen County Sheriff Steve Warren, Los Angeles County Sheriff Lee Baca, Merced County Sheriff Mark Pazin, Mono County Sheriff Rick Scholl, Monterey County Sheriff Mike Kanalakis, Orange County Sheriff-Coroner Sandra Hutchens, Placer County Sheriff Edward Bonner, San Benito County Sheriff-Coroner Curtis Hill, San Diego County Sheriff William Gore, San Joaquin County Sheriff-Coroner Steve Moore, San Luis Obispo County Sheriff Pat Hedges, Santa Barbara County Sheriff Bill Brown, Santa Clara County Sheriff Laurie Smith, Solano County Sheriff-Coroner Gary Stanton, Stanislaus County Sheriff-Coroner Adam Christianson, Sutter County Sheriff-Coroner J. Paul Parker. Tehama County Sheriff Clay Parker, Tuolumne County Sheriff-Coroner James Mete, Ventura County Sheriff Bob Brooks, Yolo County Sheriff Ed Prieto, Yuba County Sheriff Steve Durfor, City of Fremont Police Chief Craig Steckler, City of Fresno Police Chief Jerry Dyer, City of Grover Beach Police Chief Jim Copsey, City of Modesto Police Chief Michael Harden, City of Pasadena Police Chief Bernard Melekian, City of Paso Robles Police Chief Lisa Solomon, City of Roseville Police Chief Michael Blair, Contra Costa County Chief Probation Officer Lionel Chatman, Fresno County Chief Probation Officer Linda Penner, Mariposa County Chief Probation Officer Gail Neal, Sacramento County Chief Probation Officer Don Meyer, San Luis Obispo Chief Probation Officer Jim Sabo, Solano County Chief Probation Officer Isabelle Voit, Stanislaus County Chief Probation Officer Jerry Powers, and Ventura County Chief Probation Officer Karen Staples.

Docket No. 3641 in S-90-0520-LKK-JFM P) finding that a prisoner release order should issue.

Appellants take this appeal pursuant to 28 U.S.C. § 1253, providing for a direct appeal from decisions of three-judge courts.

Dated: September 3, 2009

By /s/ Chad A. Stegeman
Chad A. Stegeman
AKIN GUMP STRAUSS HAUER & FELD LLP
Steven S. Kaufhold
Chad A. Stegeman

Attorneys for the Republican Assembly and Senate Intervenors

Dated: September 3, 2009

By /s/ Martin J. Mayer (as authorized on 9/3/09)
Martin J. Mayer
JONES & MAYER
Martin J. Mayer
Kimberly Hall Barlow
Ivy M. Tsai

Attorneys for the Sheriff, Probation, Police Chief, and Corrections Intervenors

Dated: September 3, 2009

By /s/ William E. Mitchell (as authorized on 9/3/09)
William E. Mitchell
William E. Mitchell
Alan Tate
District Attorneys
County of Riverside

Attorneys for the District Attorney Intervenors

I Chad A. Stegeman, am the ECF user whose ID and password are being used to file this Notice of Appeal to the Supreme Court of the United States. In compliance with the Northern District of California General Order 45, X.B., I hereby attest that Martin J. Mayer and William E. Mitchell have concurred in this filing.

DATED: September 3, 2009

By /s/ Chad A. Stegeman
Chad A. Stegeman
AKIN GUMP STRAUSS HAUER
& FELD LLP

Attorneys for the Republican
Assembly and Senate Intervenors

(3) (2)
Supreme Court, U.S.
FILED
DEC 7 - 2009

Nos. 09-416, 09-553

IN THE

Supreme Court of the United States

GOVERNOR ARNOLD SCHWARZENEGGER, *et al.*,
Appellants,

v.

MARCIANO PLATA AND RALPH COLEMAN, *et al.*,
Appellees.

CALIFORNIA STATE REPUBLICAN LEGISLATOR INTERVENORS, *et al.*,
Appellants,

v.

MARCIANO PLATA AND RALPH COLEMAN, *et al.*,
Appellees.

Appeal from the United States District Courts for the Eastern District of California and the Northern District of California

APPELLEE INTERVENOR CALIFORNIA CORRECTIONAL PEACE OFFICERS' ASSOCIATION'S MOTION TO DISMISS OR AFFIRM

DANIEL M. LINDSAY
DAVID A. SANDERS
CALIFORNIA CORRECTIONAL PEACE OFFICERS' ASSOCIATION
755 Riverpoint Drive
Suite 200
West Sacramento, CA 95605
(916) 372-6060

LAURIE J. HEPLER
Counsel of Record
GREGG MCLEAN ADAM
GONZALO C. MARTINEZ
NATALIE LEONARD
CARROLL, BURDICK & MCDONOUGH LLP
44 Montgomery Street
Suite 400
San Francisco, CA 94104
(415) 989-5900

Attorneys for Appellee Intervenor

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QUESTIONS PRESENTED

Appellants and Appellant-Intervenors mischaracterize the issues on appeal. California Correctional Peace Officers' Association ("CCPOA") submits that the actual questions raised by Appellants' and Intervenors' Jurisdictional Statements are as follows, and that the answers to all of them are "no":

1. Was it improper to convene a three-judge district court to consider a "prisoner release order" under the PLRA to address uncontested, ongoing constitutional violations in California prisons when the State made recent and limited efforts that did not resolve the underlying cause of the constitutional violations, *i.e.*, overcrowding?

2. Did the three-judge district court clearly err in its factual finding that overcrowding is the "primary cause" of unconstitutional conditions in California state prisons?

3. May this Court properly review, for compliance with the PLRA's "nexus" and "narrow tailoring" requirements, an Opinion and Order that merely requires the State to propose a "Population Reduction Plan"?

CORPORATE DISCLOSURE

CCPOA is a non-profit corporation organized under the laws of the State of California. As such, it has no parent and there is no publicly-held company owning 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE	ii
TABLE OF AUTHORITIES	v
JURISDICTION	2
STATEMENT OF THE CASE	2
Appellants' and Appellant-Intervenors' Statements of the Case	8
THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL	12
ARGUMENT	13
I. NO FINAL "PRISONER RELEASE ORDER" EXISTS, AND NO ORDER REQUIRING RELEASE OF PRISONERS MAY EVER ISSUE	13
II. THE THREE-JUDGE PANEL WAS PROPERLY CONVENED BECAUSE THE *PLATA* AND *COLEMAN* COURTS' PREVIOUS ORDERS DID NOT REMEDY THE CONSTITUTIONAL VIOLATIONS EVEN THOUGH APPELLANTS HAD AMPLE TIME TO COMPLY	15
III. THIS COURT'S REVIEW IS UNNECESSARY BECAUSE THE THREE-JUDGE COURT CORRECTLY WEIGHED THE EVIDENCE ON WHETHER OVER-CROWDING IN CALIFORNIA PRISONS IS THE "PRIMARY CAUSE" OF CONSTITUTIONALLY INADEQUATE MEDICAL AND MENTAL HEALTHCARE	22

TABLE OF CONTENTS—Continued

Page

IV. THERE IS NO ORDER REVIEWABLE FOR COMPLIANCE WITH THE PLRA'S NEXUS AND NARROW-TAILORING REQUIREMENTS 27

CONCLUSION 28

TABLE OF AUTHORITIES

CASES Page

Addington v. Texas, 441 U.S. 418 (1979)..... 23

Coleman v. Schwarzenegger, 2007 WL 2669591 (9th Cir. 2007)..... 22

Coleman v. Wilson, 912 F. Supp. 1282 (E.D. Cal. 1995)..... 18

Dove v. Bumpers, 497 F.2d 895 (8th Cir. 1974) 22

Guillen v. Thompson, 2009 WL 2513494 (D. Ariz. 2009)..... 23

Kenyeres v. Ashcroft, 538 U.S. 1301 (2003) . 23

Mayhue's Super Liquor Store, Inc. v. Meiklejohn, 426 F.2d 142 (5th Cir. 1970) 22

Miller v. Johnson, 515 U.S. 900 (1995) 24

Roberts v. County of Mahoning, 495 F.Supp.2d 694 (N.D. Ohio 2006) 16

Roberts v. Mahoning County, 495 F.Supp.2d 713 (N.D. Ohio 2006) 23

Roberts v. Mahoning County, 495 F.Supp.2d 719 (N.D. Ohio 2007) 24

Robinson v. California, 370 13 U.S. 660 (1962)..... 13

Tyler v. Murphy, 135 F.3d 594 (8th Cir. 1998)..... 23, 24

CONSTITUTION

U.S. Const. Eighth Amend.....*passim*

TABLE OF AUTHORITIES—Continued

STATUTES Page

18 U.S.C. § 3626 ..... *passim*
28 U.S.C. § 1253 2

RULES

S. Ct. R. 18.6 1
S. Ct. R. 24.5 20

IN THE

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Appeal from the United States District Courts for the Eastern District of California and the Northern District of California

APPELLEE INTERVENOR CALIFORNIA CORRECTIONAL PEACE OFFICERS' ASSOCIATION'S MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 18.6, Appellee Intervenor California Correctional Peace Officers' Association ("CCPOA") moves to dismiss the Jurisdictional Statements filed by Appellants and Appellant-Intervenors or, in the alternative, to affirm the judgment sought to be

reviewed, on the ground that the questions on which they depend are so unsubstantial as not to warrant further review.

JURISDICTION

This Court does not have jurisdiction under 28 U.S.C. § 1253 to review the three-judge district court's Opinion and Order because it is not a final order. The lower court has merely ordered Appellants to file a "population reduction plan" for California prisons. State App. 255-256a. The lower court has not issued its final decree.

STATEMENT OF THE CASE[1]

The essence of Appellants' and Intervenors' appeals is that it is beyond the province of a federal court to tell the State to create its own solution to a conceded constitutional violation. The PLRA does not support so radical a proposition. *See* 18 U.S.C. § 3626.

Appellee Intervenor CCPOA represents the men and women who work in California state prisons: approximately 35,000 correctional officers, counselors, parole agents, medical technical assistants, and correctional sergeants and lieutenants. As peace officers, CCPOA members share the concern for public safety that compelled Congress to pass the PLRA. CCPOA intervened in this case because the extreme overcrowding in California prisons has not only caused Eighth Amendment violations, but also endangered prison staff and made it impossible for staff to fulfill their duties.

Correctional staff are the only Intervenors who daily confront these sobering realities. In granting

---

[1] Appellee Intervenor CCPOA also joins in the Statement of the Case presented by Appellees.

CCPOA's motion to intervene, the district court found: "It is plain that California's prison guards are affected by the conditions of the prisons in which they work," and that CCPOA was "uniquely situated" to provide evidence regarding prison conditions. *Coleman* Docket No. 2427.

Appellants and their Intervenors overstate the differences between the State and the district court. Although various counsel for Appellants argued in the three-judge proceeding that the constitutional violations had been remedied, the State did not actually show how it remedied the Eighth Amendment violations. Nor did it ever seek to lift the special master appointment or the receivership, respectively, on the basis that the State had remedied the constitutional violations. State App. 77a. Moreover, the State never appealed the finding of unconstitutional violations in *Coleman*, and stipulated to liability in *Plata*. *See* State App. 15-16a, 31-32a. In fact, as Appellees note, the State concedes in *Plata* that the constitutional violations continue. *See* Appellee Motion to Dismiss or Affirm Appeal of State Defendants ("Appellee Mot."), at p. 10.

Indeed, the Governor himself proclaimed over three years ago, in declaring a State of Emergency under California law, that continuous and severe overcrowding in California prisons had created increasingly unsafe conditions for inmates and workers. Appellee App. 1-2a; State App. 61-62a. His Emergency Proclamation remains in effect. *See* State App. 62a. It details grave statistics evidencing that California prisons are "at or above maximum operational capacity," causing "conditions that pose substantial safety risks," including "an increased substantial risk of violence, and greater difficulty in controlling

inmate populations" and "substantial risk for transmission of infectious illnesses." Appellee App. 1-10a. The Governor concluded that "immediate action is necessary to prevent death and harm caused by California's severe prison overcrowding . . ." *Id.* at 12a.

The *Plata* and *Coleman* lawsuits sought to redress conditions closely related to what the Governor described: the prison system's failure to provide constitutionally adequate medical and mental health care. Appellees moved to convene a three-judge district court to consider a "prisoner release order" only after years of escalating orders from the two district courts failed to cure the Eighth Amendment violations because of severe overcrowding. The *Plata* and *Coleman* courts held individual and joint hearings on the matter before they convened the panel. State App. 273-274a, 289a.

The three-judge court found that correctional staff were "essential to providing healthcare to prisoners." State App. 110a, quotation and citation omitted. Among other roles, correctional officers escort prisoners to medical services within an institution, and they supervise prisoners transported elsewhere for treatment. *Ibid.* Perhaps more importantly, correctional staff are responsible for alerting medical staff when prisoners complain of acute medical issues, and are charged with observing prisoners to identify health or mental problems. *Ibid.*

But as correctional officers testified at trial, overcrowding makes it difficult to perform their roles properly—or in many instances, at all:

- Officer Brenda Gibbons testified that she observed mentally-ill prisoners being held in converted supply closets for lack of available suicide-watch beds. Trial Tr. 558-560, 575-

576. Although state prison regulations limit the time spent in such holding cells to four hours, officers are ordered to cycle inmates from those cells to another room and then back due to the lack of available beds, resulting in overnight stays. *Id.* at 575.

- Due to lack of interior space, half of the mental health programs that Officer Gibbons observes take place in the prison yards, requiring those programs to be cancelled whenever weather is poor or officers must leave to deal with emergencies. *Id.* at 566, 577.

- Inmates wait hours for medical care in chaotic and unsafe conditions. Officer Gary Benson testified that up to fifty inmates routinely wait in a fenced holding area for two to five hours, to see a doctor in a 20-foot by 35-foot "clinic." Doctors examine four to six inmates in the same tiny room, surrounded by unlocked boxes of needles, scissors, and narcotics. Officer Benson is the only officer present. Trial Tr. 592-599.

- Debra Rowlett is a correctional officer and a licensed nurse. Trial Tr. 657, 659-660. She testified that she witnessed inmates standing in lines 300 people deep to obtain their prescribed psychotropic medications. Officer Rowlett testified that inmates sometimes receive the wrong medication. Correctional staff and nurses have no time to double-check prescriptions, ask about adverse effects, or ensure that inmates consume their medication—all essential for proper medical care. Unsupervised prisoners may have their medication stolen by other inmates, or hoard it, rather

than consuming it. Officer Rowlett testified that at least one prisoner died after purposely overdosing on hoarded medication. *Id.* at 665-667.

- Correctional Sergeant Kevin Raymond works on a team responsible for prison construction and operations planning. Trial Tr. 535-536. He testified that the majority of California prisons were designed with sufficient medical space to treat a population of only one inmate per cell, yet CDCR planned to house two inmates per cell. *Id.* at 542-543. Thus almost all California prisons have less than half the space necessary to provide adequate medical care at current population levels. (But even if there were sufficient space, correctional officers testified that there are insufficient correctional officers to transport inmates to appointments or to monitor them. Trial Tr. 679, 692; *see also* State App. 110a.)

These officers' testimony made plain that adequate correctional-staff-to-inmate ratios are essential for delivery of constitutionally adequate medical and mental health services to California prisoners. The three-judge district court, however, found that "[t]he California prison system lacks sufficient custodial staff . . . to provide prisoners with timely access to [medical] care and still perform other essential [penological] functions." State App. 110a, quotation and citations omitted. The evidence established that understaffing undermines health care services, placing prisoners at substantially increased risk of further deterioration. State App. 111-112a. Despite their best efforts, overworked correctional staff are not able to respond to medical emergencies because of

"forced overtime and burnout" (State App. 111a, quotations and citations omitted), and because it is unsafe to leave hundreds of prisoners supervised by only one officer so that his or her partner can take a sick inmate to receive medical care. *Id.* at 110-111a.

Based on this and other evidence, presented over a multi-week trial, the three-judge district court concluded that overcrowding was the primary cause of the unconstitutional violations in California prisons. State App. 140-143a. After determining that no other relief would remedy the constitutional violations (*id.* at 168a), that it was the least intrusive remedy (*id.* at 168-175a), and that public safety would not be adversely affected (*id.* at 220-234a), the three-judge court ordered the State to *propose a plan* to reduce the prisoner population to 137.5% of design capacity within two years. *Id.* at 255-256a. It did not order any specific relief—much less any prisoner release—but instead allowed the State to design its own plan in the first instance. *Id.* The court outlined numerous options available to the State to comply with its order (*id.* at 192-220a), many of which the Governor himself recently proposed to the Legislature for independent budgetary reasons, including a prisoner reduction of 37,000 over two years. *See Plata* Docket No. 2269.

The State's first submitted plan did not comply with the most basic parameters of the court's order. *Plata* Docket No. 2269. Accordingly, the court rejected the State's plan on October 21, 2009, requested more information regarding the Governor's proposed plans to the Legislature, and gave the State even more time to submit a plan that did comply. *Ibid.* On November 12, the state filed its second proposed population plan. *Plata* Docket No. 2274.

Appellants' and Appellant-Intervenors' Statements of the Case

Appellants and their supporting Intervenors take substantial liberties with the record.

First, as explained above and as Appellees demonstrate in their Motion, the unconstitutional conditions are established and conceded by Appellants—not merely "alleged" (State J.S. 2; State App. 77a) and certainly not before this Court for review. The three-judge court admitted all evidence of current conditions; the State identifies no evidence that was offered but not admitted, and never made an offer of proof as to any such evidence. *See* Appellee Mot. 20-23. The three-judge court did not re-determine whether there was a continuing constitutional violation because it was neither authorized nor requested to do so. No such request came from Appellants or their Intervenors (State App. 77a), and in all events, the three-judge district court was convened under the PLRA only for the purpose of considering a "prisoner release order." *See* 18 U.S.C. § 3626(a)(3)(B).

Appellant-Intervenors in particular argue that the three-judge court should not have issued the Opinion and Order without renewed proof that the violations were ongoing. Intervenors' J.S. 8-9. Their position would result in a never-ending loop: a remedial phase lengthy enough to assure a three-judge court that no relief other than a population limit can alleviate the constitutional violations would always result in the original findings becoming "stale." The three-judge court would thus always be required to revisit the findings of unconstitutional conditions—which it has no authority to do under the PLRA (*see* 18 U.S.C. § 3626(a)(3)(A), (B))—and no relief would ever be

possible. An interpretation of the PLRA that effectively nullifies it must be rejected.

The proper forum for Appellant-Intervenors to challenge the finding of constitutional violations is before the single-judge district courts with a motion to terminate the respective actions. If those courts were to find that the constitutional violations were remedied, under the PLRA, the three-judge court's order can be modified or terminated. *See* 18 U.S.C. § 3626(b)(1), (4). Appellant-Intervenors never so moved.

Second, Appellants gloss over their non-compliance with orders issued over many years by the *Plata* and *Coleman* courts, emphasizing only the most recent orders and Appellants' attempts at compliance. State J.S. 6-9. In particular, the appointment of a Receiver in *Plata* was hardly the beginning of the story, but instead an extraordinary measure born of that court's lengthy struggle against Appellants' failures and recalcitrance. State App. 21-30a, 281a (Receivership was culminating order at the end of series of less intrusive orders that brought no meaningful change).

The State also maintains that it had no opportunity to implement Assembly Bill 900, which would have alleviated the violations. But the *Plata* and *Coleman* courts both considered the potential impact of that bill, and determined that it could proceed simultaneously with the three-judge panel's consideration of a prisoner release order, particularly since Assembly Bill 900 would take years to implement and did not sufficiently address overcrowding or understaffing. *See* State App. 283-284a (*Plata*), 299-304a (*Coleman* court: "AB 900 simply fails to address in any timely way relief from the overcrowding crisis"), 146-147a (Three-Judge Court: noting that "not a single [re-entry] facility had been constructed

under AB 900" and that "California has no plans to construct additional prisons in the near future and has not suggested that it does").

The State disputes the court's finding that overcrowding was the principal cause of the constitutional violations because there were "other causes." State J.S. 9. But the court correctly recognized that the common font of these problems was overcrowding.

Appellants claim that the Opinion and Order would cause a "statistically significant increase in crime" (State J.S. 10), but the Order only requires the State to create a plan, leaving it to the State to ameliorate the impact on public safety in the manner it sees fit given California's priorities. (State App. 174a) The only option *not* open to California is to continue its longstanding contempt for the Eighth Amendment to the United States Constitution.

Appellants also fault the court for using the 137.5% figure as the cap for California prisons but nowhere explain what is actually inappropriate about that number. State J.S. 10. Moreover, the court's order is not overbroad because it need not reach members outside the *Plata* and *Coleman* classes (*Ibid.*), since there is no "prisoner population cap" yet in place and the State may in its discretion choose to exclude non-class members. Regardless, given that the court found that a systemic approach was necessary to remedy the widespread impact of the constitutional violations and prison conditions, this is unlikely.

To the extent no order like the August 4 Order has been previously "imposed" on a State (State J.S. 2), it is because no other State has similarly refused to remedy Eighth Amendment violations when repeatedly ordered to do so. But even here, California's

resistance to compliance with the Constitution did not provoke intemperate judicial meddling, as Appellants and their Intervenors suggest. On the contrary, the three-judge court acted with great care and caution, conscious of the limitations imposed by federalism and the dignity of the State, but ultimately cognizant of their role in protecting federal rights. *See* State App. 254a ("Federal courts do not intervene in state affairs lightly. Principles of federalism, comity, and separation of powers require federal courts to refrain from addressing matters of state government in all but the most pressing of circumstances."); 156a (rejecting reliance on *Plata* Receiver as alternative remedy because "scope of intrusion by the Federal Court" would inevitably increase); 171-174a (imposing system-wide population cap because institution-specific caps intrude on "state's management of its prisons").

After closing argument at trial, the panel beseeched the State to remedy the violations on its own:

> I hope that the next time we are together it will be so that you can tell us that California's leaders have not only recognized the seriousness of the crisis, but have finally agreed to take the necessary steps to resolve it . . . [¶] If not, it will be for us, perhaps after further exploration of some of the possible remedies, to tell you how it will be resolved. [¶] I cannot possibly convey to you the depth of our reluctance to do it that way, but if you leave us no alternative, we will.

Trial Tr. 3145. Appellants indeed left the court no alternative, continuing a pattern of many years' duration.

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

The issues raised in the Jurisdictional Statements are primarily factual disputes that are insufficiently substantial to merit plenary review. The three-judge district court's population cap order creates no conflict within the federal judiciary over the meaning of the PLRA or its application. Finally, the decision has limited precedential value because these facts are unique; they have not been and are unlikely to be repeated in other jurisdictions.

The three-judge court's findings are factual in nature and thus limited to the circumstances of this case. *See* State App. 274a and 290a (*Plata* and *Coleman* courts defining question before them as whether prior orders issued and "reasonable" time given for compliance); *id.* at 73-74a (three-judge court: is there "clear and convincing evidence" that overcrowding is the primary cause of constitutional violations); *id.* at 75-76a (narrow tailoring and public safety). As such this case does not present issues demanding nationwide uniformity. All issues that Appellants and Intervenors present for review are really challenges to the lower courts' factual determinations. This Court should decline their invitation to sift through the evidentiary record.

Nor, as explained above, does this case implicate the federalism concerns raised by Appellants or Intervenors. In the lower courts, the State was given every opportunity to comply with court orders to address undisputed violations of the Eighth Amendment, and to propose specific relief—substantial deference to a recalcitrant party, given the gravity of the violations established. The Eighth Amendment (among others) says what a state may not do under

any circumstances (*see Robinson v. California*, 370 U.S. 660 (1962) (applying Eighth Amendment to the states)), yet California has been doing some of those things for so long, without serious progress toward remedy, that the three-judge court was authorized—indeed compelled—to act.

Further, the State cites no conflict in lower courts regarding the primary issues for review even as they frame them: (A) the standards for convening a three-judge panel, (B) the meaning of the PLRA's "primary cause" standard, or (C) the PLRA's "nexus" and "narrow tailoring" requirements. *See* State J.S. 11-13. Appellants and their Intervenors cite no cases demonstrating any conflict among the lower courts regarding the application of the PLRA.

Finally, even if the issues Appellants raise might otherwise merit review, this case is not the proper vehicle because of the State's almost two-decade-long failure to comply with over 70 court orders formulated to achieve compliance with the Constitution. State App. 38a. This is an exceptional factual scenario unlikely to be repeated.

ARGUMENT

CCPOA supports affirming the three-judge district court's actions below or, in the alternative, dismissing Appellants' and Intervenors' Jurisdictional Statements.

I. NO FINAL "PRISONER RELEASE ORDER" EXISTS, AND NO ORDER REQUIRING RELEASE OF PRISONERS MAY EVER ISSUE.

Despite its inapt name and Appellants' repeated implication, a "prisoner release order" under the PLRA does not require California to fling open its prison

gates. CCPOA cedes no ground to anyone in its concern for public safety, and would not support so indiscriminate an order. Rather, a "prisoner release order" is "any order . . . that has the purpose or effect of reducing or limiting the prison population . . . ." *See* 18 U.S.C. § 3626(g)(4).

The three-judge court ordered a population cap but did not order a release of prisoners. Instead, it directed the State to submit its own plan for achieving that cap within two years. State App. 255-256a. In developing its plan, the State could "choose among many different options or combinations of options for reducing the prison population." State App. 174a. These various options were recommended not only by Appellees' experts, but also by the State's own experts, "including the Governor, CDCR officials, and the CDCR Expert Panel." State App. 249a, 174a. Accordingly, the three-judge court included them on a non-exclusive list outlining how California could comply with the Order:

- Expansion of "good time" credits allowing prisoners to earn limited early release;
- Diverting technical parole violators from prisons;
- Diverting low-risk offenders with short sentences from prisons;
- Expansion of rehabilitation programs; or
- Sentencing reform.

State App. 196-219a, 248-253a. The State's initial effort at a population-reduction plan incorporated many of these alternatives to release (*see* State App. 319-327a, 340-342a), as does its most recent proposal, filed November 12, 2009 (*see Plata* Docket No. 2274-1).

There is no imminent threat of lawlessness. The overwhelming testimony at trial supported the district court's conclusion that such population reduction measures "either have no impact on or reduce the recidivism rate" and therefore "would not adversely affect public safety." State App. 249a.

II. THE THREE-JUDGE PANEL WAS PROPERLY CONVENED BECAUSE THE *PLATA* AND *COLEMAN* COURTS' PREVIOUS ORDERS DID NOT REMEDY THE CONSTITUTIONAL VIOLATIONS EVEN THOUGH APPELLANTS HAD AMPLE TIME TO COMPLY.

CCPOA supported Appellees' efforts to convene the three-judge court because the single-judge district courts had exhausted all other means to bring the California prison system into compliance with the Eighth Amendment. Throughout the long history of *Plata* (almost 8 years) and *Coleman* (18 years), not a single prison was ever in full compliance with those courts' orders, despite specific timelines, plans, and stipulations by Appellants. State App. 17a.

This was *more* than what the PLRA required, and indeed, the single-judge district courts proceeded with exceptional caution over many years. Contrary to the State's contention, there was no rush to convene this panel. CCPOA endeavors to provide this Court with necessary context that amply justified—both legally and practically—the convening of the three-judge district court.

1. The PLRA sets forth two requirements to convene a three-judge panel: (1) the single-judge court previously entered orders for less intrusive relief that failed to remedy the violation of the federal

right; and (2) Appellants had a reasonable amount of time to comply with those orders. *See* 18 U.S.C. § 3626 (a)(3)(A), (C). No Appellants cite any conflict among lower courts in interpreting or applying the PLRA at all, let alone regarding the propriety of convening a three-judge panel. The fact is that not many courts have found need to construe these provisions, and courts that have done so, including the three-judge panel here, have had no difficulty. *See, e.g., Roberts v. County of Mahoning*, 495 F.Supp.2d 694 (N.D. Ohio 2006). There is simply no call for this Court to step in to address this issue; rather it should first allow the lower courts to develop a body of law addressing it.

Moreover, the factual determination whether the PLRA's statutory predicates are satisfied is not an issue of "jurisdiction," for the reasons outlined in Appellees' Motion. Appellee Mot. 28-36. The single-judge courts were well-positioned to make that factual determination, and they did so correctly based on the lengthy records.

2. The State failed for years to implement the *Plata* and *Coleman* courts' orders.

In *Plata*, Appellants conceded that prison conditions were unconstitutional and judicial oversight necessary under the PLRA. State App. 15-16a; *Plata* Docket No. 68, ¶29 (June 13, 2002 Stipulation and Order for Injunctive Relief, stipulating that all requirements of PLRA satisfied). Appellants utterly failed to implement meaningful reform and did not meet any of the court-imposed deadlines or timelines upon which they had agreed. State App. 17a.

The *Plata* court tried everything within reason to bring the State into compliance:

- Entered multiple orders, including reiterations of prior orders, with which the State did not comply. State App. 17-20a.
- Appointed prison experts to review conditions and report on recommendations; the experts came back with dismal progress reports month after month. *Id.*
- The district court judge even began to meet with the parties on a monthly basis to identify the impediments to reform and assist defendants in overcoming them. State App. 21a.

These efforts were all unsuccessful in persuading Appellants to comply with the policies that they themselves admitted were necessary to remedy the constitutional violations. State App. 14a ("defendants proved incapable of or unwilling to provide the stipulated relief").

After remedial efforts stalled for three years, the *Plata* court issued an order to show cause why the State should not be found in contempt and why a receiver should not be appointed to manage prison health care delivery. State App. 21-24a. The court held a six-day bench trial and found that Appellants were "unwilling or incapable of breaking out of a deeply entrenched bureaucratic mind-set, and have refused or been unable to take the steps necessary to prevent further needless loss of life and suffering among its wards." *Plata* Docket No. 371 (Oct. 3, 2005 Findings) at 37-39. Faced with an intractable situation, the *Plata* court took the extraordinary step of imposing a receivership over the California state prison medical care system. State App. 28-29a ("the

Court is simply at the end of the road with nowhere else to turn," because of "the state's abdication of responsibility," quotation and citation omitted).

Appointment of the Receiver was thus a culminating step designed to ensure compliance with court orders long ignored. The Receiver began running the prison medical system in early 2006. State App. 29-30a. But, even exercising all the powers of the CDCR Secretary related to medical care, the Receiver was unable to remedy the conditions in the prisons because of severe overcrowding. *Ibid.*

The history of *Coleman* is similarly grim. After a trial in 1995, the *Coleman* court held that the Eighth Amendment rights of mentally ill prisoners were violated due to "systemwide deficiencies in the delivery of mental health care." *Coleman v. Wilson*, 912 F. Supp. 1282, 1316 (E.D. Cal. 1995); State App. 30-36a. The court appointed a Special Master to assist Appellants' compliance with the remedial orders. State App. 36a.

For more than a decade, the *Coleman* court issued over 70 orders aimed at eliminating the shortage of beds and space for prisoners in need of psychiatric treatment. State App. 30-31a, 36-46a. The court had to issue orders repeatedly because Appellants failed to effectuate the relief required. For example, on April 17, 2006, defendants filed their third bed plan in response to the court's repeated orders. *Coleman* Docket No. 1800. It was inadequate. *Ibid.*

The *Coleman* court summarized the results of its orders: "The special master reports, the record reflects, and defendants admit, that [Appellants' remedial plan] in no way adequately respond[ed] to the severe shortage of . . . mental health crisis beds that currently exists in the CDCR." *Ibid.* That bed plan

was only the most recent incarnation of similar orders issued throughout the then-eleven year remedial phase of the case. *See also Coleman* Docket No. 3450 ("the State has no current viable bed plan [and] is uncertain as to when [one] can be developed," which the court concluded "demonstrate[s] an unacceptable lack of commitment to its constitutional duty, much less to the orders of this court"). As of the time of trial the State's non-compliance persisted. State App. 77a (noting that *Plata* and *Coleman* courts found on-going violations without objection from the State when the three-judge court convened, and that no motion to terminate under § 3626(b) of the PLRA had been filed).

Court orders to implement Appellants' own mental health program standards met a similar fate. The *Coleman* court ordered Appellants to comply with these standards in June 1997. *Coleman* Docket No. 858. The court allowed Appellants more than 10 years to comply with the standards, and even allowed Appellants to revise them in 2006 (*Coleman* Docket No. 1773), but Appellants never met many of their own standards. *See, e.g.,* Pls.' Trial Exh. P264[2]

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[2] The three-judge court ordered the parties to submit written evidentiary objections to trial exhibits. Trial Tr. 650-651; *see also id.* 635 (noting there were "thousands of objections"); Plata Docket Nos. 1973, 1975 (parties' written evidentiary objections and responses). In its 8/4/09 Order Ruling on Evidentiary Matters, the court ruled that all objections to exhibits cited in its concurrently-filed 8/4/09 Opinion and Order (the subject of these appeals) were overruled, and that it would not rule on objections to exhibits not cited in its order "as we have not relied on such evidentiary material in making our ruling." Plata Docket No. 2198.

Accordingly, per Supreme Court Rule 24.5, trial exhibits cited in this motion that were relied on in the 8/4/09 Order are

(Unmet Need Chart), *Plata* Docket No. 1973 (objection withdrawn); Defs.' Trial Exh. D1020 at 4, *Plata* Docket No. 1975 (no objection); Trial Tr. 915-916; Pls.' Trial Exh. P57 at 353, *Plata* Docket No. 1973 (objection withdrawn); *see also* Defs.' Trial Exh. D1148 at 12, cited at State App. 38, n.16.

Appellants also failed, and continue to fail, to comply with their own guidelines and court orders regarding suicide prevention. *Coleman* Docket No. 3677.

The *Plata* and *Coleman* orders failed to remedy the constitutional violations, even though the State was given every opportunity, and more-than-reasonable time, to comply. The PLRA required no more for the appointment of this three-judge court. *See* 18 U.S.C. § 3626(a)(3)(A), (C).

3. The *Plata* and *Coleman* courts even delayed deciding whether to convene the three-judge panel, to give Appellants additional time to comply. Notwithstanding years of violated orders, the *Plata* and *Coleman* courts did not rush to convene the three-judge district court under the PLRA.

The *Coleman* and *Plata* plaintiffs moved for such a proceeding in November 2006 (State App. 62-63a), but the courts delayed ruling on the motions for eight months. State App. 275-277a, 289a. Each court sought input from either the Receiver (*Plata*) or the Special Master (*Coleman*) regarding how overcrowding affected their respective ability to remedy the

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followed by a reference to that Order (indicating they were admitted), and trial exhibits for which there were no standing objections are followed by a reference to the parties' filings (indicating no objection or that withdrawn).

constitutional violations. State App. 63a. And both courts virtually begged the State to use this time to identify means to remedy the constitutional violations or the overcrowding without judicial intervention. State App. 63a, 286a, 304a (expressing "extreme reluctance" to convene three-judge panel).

The *Plata* Receiver and the *Coleman* Special Master separately reported that their efforts could not remedy the constitutional violations so long as the prisons remained overcrowded. State App. 65-69a, 281-283a (*Plata*), 295-296 (*Coleman*). In the intervening months, the State failed to take any meaningful action to remedy the violations or comply with court orders. The *Plata* and *Coleman* courts thus proceeded to request the establishment of the three-judge panel, finding that the statutory prerequisites were met. State App. 69a, 285-287a, 304a.

Both courts expressed great reluctance to issue their orders. State App. 287a, 304a. The *Plata* court in particular urged the parties to come to a mutual agreement because "[t]his Court would like nothing more than to have the three-judge court be able to enter a consent judgment without the need for a prisoner release order." State App. 287a.

Once convened, the three-judge court itself took yet another step to avoid the need for any federally-imposed remedy. It appointed one current and one former justice of the California Court of Appeal to mediate months of settlement discussions among the parties. State App. 69-70a. Only after that effort failed did the matter proceed to trial. State App. 70a.

4. This Court has no jurisdiction to review the convening of the three-judge panel because the single-judge district court orders responsible for that

were appealable directly to the court of appeals. *See, e.g., Dove v. Bumpers*, 497 F.2d 895, 896 (8th Cir. 1974) (court of appeals has jurisdiction to determine whether three-judge panel properly convened); *Mayhue's Super Liquor Store, Inc. v. Meiklejohn*, 426 F.2d 142, 144-45 (5th Cir. 1970) (same).

The State in fact appealed this issue to the Ninth Circuit Court of Appeals. *Coleman v. Schwarzenegger*, 2007 WL 2669591 (9th Cir. 2007). The Ninth Circuit concluded that the orders were not ripe for review, as no final order had issued. *Id.* Once there is a final order from the three-judge court, Appellants may again take an appeal to the Ninth Circuit Court of Appeals.

III. THIS COURT'S REVIEW IS UNNECESSARY BECAUSE THE THREE-JUDGE COURT CORRECTLY WEIGHED THE EVIDENCE ON WHETHER OVERCROWDING IN CALIFORNIA PRISONS IS THE "PRIMARY CAUSE" OF CONSTITUTIONALLY INADEQUATE MEDICAL AND MENTAL HEALTHCARE.

Appellants' and Appellant-Intervenors' Jurisdictional Statements inappropriately invite this Court to second-guess the three-judge district court's factual determination that overcrowding was the primary cause of the constitutional violations in this case. CCPOA joins in Appellees' arguments on this point as well.

The evidence amply supports the district court's extraordinarily detailed opinion finding that overcrowding is the primary cause of the unconstitutional conditions in California prisions. Evidence was taken in a two-month trial, which included former heads of

prison systems in California, Texas, Washington, Maine and Pennsylvania—most of whom had never previously testified on behalf of prisoners. State App. 80-81a. This Court has no compelling reason to review the three-judge court's finding, which was in all events correct.

1. The "primary cause" of a constitional violation is a question of fact under the PLRA. The statute provides that a "three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that" prison "crowding is the primary cause of the violation of a Federal right." *See* 18 U.S.C. § 3626(a)(3)(E).

"Clear and convincing" is a standard of evidentiary proof. *See Addington v. Texas*, 441 U.S. 418, 424-425 (1979) ("clear and convincing evidence" is "standard of proof" that lies "between a preponderance of the evidence and proof beyond a reasonable doubt"); *Kenyeres v. Ashcroft*, 538 U.S. 1301, 1305 (2003) (same). By incorporating it into the PLRA, Congress necessarily conveyed that this determination is factual in nature. Federal courts applying the PLRA's "primary cause" requirement have uniformly held it is a factual determination. (*See, e.g., Tyler v. Murphy*, 135 F.3d 594, 596 (8th Cir. 1998) (reversing single-judge prisoner release order because it was entered "without the requisite evidentiary hearing and mandated findings of fact" relating to "primary cause"); *Roberts v. Mahoning County*, 495 F.Supp.2d 713, 715 (N.D. Ohio 2006) (three-judge panel addressing which party has "burden of proof" to establish constitutional violations where district court convened panel *sua sponte*); *see also Guillen v. Thompson*, 2009 WL 2513494 at *5 (D. Ariz. 2009) (state-defendant arguing that prisoner release order

improper because pro se plaintiff "has not proffered any evidence or proof that overcrowding is the cause of his alleged violation," as required under PLRA). These courts generally did what the three-judge district court here did: hold or require an evidentiary hearing or trial (*cf. Tyler,* 135 F.3d at 596), or enter consent decrees (*Roberts v. Mahoning County*, 495 F. Supp. 2d 719 (N.D. Ohio 2007)). There is no serious dispute that the PLRA's "primary cause" determination requires a factual rather than legal inquiry.

Appellants' only citation to the contrary is a footnote from the three-judge district court's decision. State J.S. 9 and 18, both citing State App. 126a n.55. But there, the court addressed a different and narrower point: although "primary cause" is a question for the three-judge panel, it is allowed to consider expert opinion testimony going to "the ultimate issue" in the case. *See* State App. 126a n.55. To the extent the court stated loosely that "the primary cause issue is ultimately a question of law," that is incorrect. Causation is a factual question reviewed only for clear error. *See Miller v. Johnson*, 515 U.S. 900, 917 (1995). Moreover, the court did not hold that the entire inquiry is legal in nature, and sitting as a trial court, could not have meant any such thing. The only arguably legal issue is whether the evidence is sufficient to satisfy the "clear and convincing" standard. It is, and the State never argues in its Jurisdictional Statement that the evidence was insufficient to meet this standard.

Appellants also argue that the PLRA should be interpreted to require that overcrowding be a "but for" cause of the constitutional violation. State J.S. 20-24. This argument was not presented to the lower court and therefore waived, but in all events it is

plainly wrong. It would have been simple enough for Congress to make "proximate cause," "but for cause" or "exclusive cause" the statutory standard. Instead it selected "primary cause," a distinct and readily comprehensible phrase. *See* 18 U.S.C. § 3626(a)(3)(E)(i). The three-judge district court properly interpreted the PLRA's "primary cause" requirement, and even adopted Appellants' definition. *See* State App. 78-79a. This Court need not revisit that holding.

Neither Appellants nor Appellant-Intervenors ever hint what the "primary cause" of the constitutional violations in *Plata* and *Coleman* might be, if not the extreme and endemic overcrowding in California prisons. Instead they attempt to re-frame the question as one of legal, "but-for" causation, heedless of the PLRA's plain words.

2. The district court correctly determined that overcrowding strains existing correctional officer staffing levels, which directly impacts delivery of medical and mental care for inmates. State App. 110-112a. This finding is borne out by the testimony provided by custodial staff.

The court considered officer testimony that in some prison housing units, one or two correctional officers supervise approximately 200 inmates. State App. 111a. It found that when a prisoner medical emergency arises under these circumstances, custodial staff "can only sound the alarm, make frantic telephone or radio calls, and hope for backup." *Ibid.* For example, Officer Rowlett testified that if officers respond to a serious medical emergency (as she and her partner had to with an inmate who suffered three seizures a day), no correctional officer is available to supervise the other almost two hundred inmates, creating a safety hazard for inmates and staff. Trial

Tr. 678-680. Under these circumstances corrections officers must quickly decide whether an apparent health emergency is real, or a diversion designed to distract officers, under peril of their own safety and that of the sick inmate. State App. 111a. This is unsafe for inmates and staff.

The three-judge court also relied on evidence from the *Plata* Receiver that custodial understaffing and the State's lack of an "organizational structure and processes" for escorting prisoners to medical appointments results in "denial of timely access to health care services and substantially increases the risk that [prisoners'] health will further deteriorate." State App. 111a-112a, citations and quotations omitted. Inadequate correctional staffing "caused significant delays in treatment." State App. 112a, citation and quotation omitted. The State's own mental health expert testified that the "shortage of correctional officers statewide compared to the number of inmates impedes the delivery of mental healthcare" to the *Coleman* class. *Ibid.*, citation and quotation omitted.

After considering this and extensive other evidence, the three-judge district court concluded that "[a] reduction in the crowding of California's prisons would help ease the burden on the custodial staff and permit staff members to better monitor inmates for medical or mental health problems and to deliver inmates for necessary care." State App. 112a. As Appellees explain, the State does not deny that overcrowding strains correctional staff's ability to provide services to prisoners, including access to medical and mental healthcare. *See* Appellees' Mot. 13-17.

IV. THERE IS NO ORDER REVIEWABLE FOR COMPLIANCE WITH THE PLRA'S NEXUS AND NARROW-TAILORING REQUIREMENTS.

These appeals are premature because there is no final order for this Court to review. Dismissal is proper on this ground alone. *See* Appellees' Mot. 8-10. The three-judge court simply has not issued any order this Court can review for consistency with the PLRA's "nexus" and "narrow tailoring" requirements.

The three-judge court acted with restraint by allowing the State to submit a proposed plan, rather than ordering it outright to reduce its prison population in some judicially-selected way. It gave the State forty-five days to submit a plan that would gradually reduce the prison population to 137.5% of design capacity over two years. State App. 255-256a. True to form, Appellants submitted a plan aimed at reducing the prison population to 166% of design capacity over 5 years—which the court rejected on that ground and for multiple other failures to comply with its directive. *Plata* Docket No. 2269. The three-judge court gave the State another 21 days to comply, and the State filed a new plan on November 12, 2009. *Plata* Docket No. 2274. Only if the three-judge court determines that the State's new plan does not comply will the court develop a plan independently.

Appellants and Appellant-Intervenors argue that the order to develop a plan to reduce the prison population to 137.5% of capacity within two years is a "prisoner release order" under the PLRA. State J.S. 1-2a; Intervenors' J.S. 5. That is incorrect because the only actual injunction the court has issued is to formulate a plan for reaching that goal.

Intervenors argue that the three-judge district court should have ordered other alternatives to a population cap. Intervenors' J.S. 13. But that is not the role of a three-judge district court under the PLRA; such a panel is convened expressly for the purpose of considering a "prisoner release order." *See* 18 U.S.C. § 3626(a)(3)(B), (E). All other judicially-available remedies were already employed to no avail by the *Plata* and *Coleman* courts.

CONCLUSION

For all these reasons, this Court should dismiss the appeals and/or affirm the three-judge district court's order.

Respectfully submitted,

DANIEL M. LINDSAY
DAVID A. SANDERS
CALIFORNIA CORRECTIONAL PEACE OFFICERS' ASSOCIATION
755 Riverpoint Drive
Suite 200
West Sacramento, CA 95605
(916) 372-6060

LAURIE J. HEPLER
Counsel of Record
GREGG MCLEAN ADAM
GONZALO C. MARTINEZ
NATALIE LEONARD
CARROLL, BURDICK & MCDONOUGH LLP
44 Montgomery Street
Suite 400
San Francisco, CA 94104
(415) 989-5900

Attorneys for Appellee Intervenor California Correctional Peace Officers' Association

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IN THE

Supreme Court of the United States

GOVERNOR ARNOLD SCHWARZENEGGER, *et. al.*,
Appellants,
v.
MARCIANO *PLATA* AND RALPH *COLEMAN*, *et. al.*,
Appellees.

Appeal from the United States District Courts
For the Eastern District of California and
The Northern District of California

JOINT MOTION TO DISMISS OR AFFIRM APPEAL OF DEFENDANT-INTERVENORS

Michael Bien
Jane E. Kahn
Ernest Galvan
Amy Whelan
Lisa Ells
ROSEN, BIEN & GALVAN, LLP
315 Montgomery St., 10th Fl.
San Francisco, CA 94104
Counsel for Coleman Appellees

Donald Specter
Counsel of Record
Steve Fama
Alison Hardy
Sara Norman
Rebekah Evenson
PRISON LAW OFFICE
1917 Fifth Street
Berkeley, CA 94710
(510) 280-2621
Counsel for Coleman and Plata Appellees

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether the court below clearly erred when it found, pursuant to the Prison Litigation Reform Act, 18 U.S.C. § 3626(a)(3)(E)(i) (1996), that prison "crowding is the primary cause of the violation of a Federal right," and that "no other relief," other than a reduction in prison crowding, would remedy the violations.

2. Whether, after finding that prison overcrowding is the primary cause of the constitutional violations, and that reducing crowding is a prerequisite to remedying the violations, the court below clearly erred by ordering the State to develop a plan to reduce the prison population.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
JURISDICTION 4
THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL 6
I. The Three-Judge Court Did Not Clearly Err When It Found That Crowding Is The "Primary Cause" Of The Constitutional Violations And That "No Other Relief" Would Remedy the Violations. 6
A. The Three-Judge Court's Decision Was Based On Evidence About Current And Ongoing Prison Conditions. 6
B. The Three-Judge Court Properly Considered Reports Of The Plata Receiver, The Coleman Special Master, And The Experts 11
C. The Three-Judge Court's Findings With Respect To "No Other Relief" Are Correct And Uncontested. 17
II. The Order Below Provides The Least Intrusive Means To Remedy The Constitutional Violations, And Is Narrowly Tailored. 20
III. Intervenors' Arguments Regarding Public Safety Are Misplaced. 23
A. The Three-Judge Court Correctly Found That There Are Numerous Means To Safely Reduce The Prison Population. 26
B. Intervenors' Complaints About The Three Judge Court's Methodology And Findings Are Misplaced. 32
CONCLUSION 37

TABLE OF AUTHORITIES

CASES

Anderson v. Bessemer City,
470 U.S. 564 (1985) 33

Bounds v. Smith,
430 U.S. 817 (1977) 21, 32

Columbus Bd. of Education v. Penick,
443 U.S. 449 (1979) 20, 21

Davis v Bd.. of School Comm'rs of Mobile Cty.,
402 U.S. 33 (1971) 21

Johnson v. California,
543 U.S. 499 (2005) 4

Lewis v. Casey,
518 U.S. 343 (1996) 20, 21, 32

Missouri v. Jenkins,
515 U.S. 70 (1995) 20

Plata v. Schwarzenegger,
No. 09-15864 (9th Cir.) 18

STATUTES

Prison Litigation Reform Act, 18 U.S.C.
§ 3626 (1996) ..... *passim*

18 U.S.C. § 3626(a) 7

18 U.S.C. § 3626(a)(1)(A) 23

18 U.S.C. § 3626(a)(3)(E) 7

18 U.S.C. § 3626(a)(3)(E)(i) i

18 U.S.C. § 3626(b) 7

18 U.S.C. § 3626(b)(1) 23
18 U.S.C. § 3626(b)(4) 23
18 U.S.C. § 3626(e) 7
18 U.S.C. § 3626(g)(4) 17
28 U.S.C. § 1253 4

MISCELLANEOUS

H.R. Rep. No. 104-21,
§ 301 (1995) 24

Pursuant to Rule 18.6, appellees move to dismiss the appeal or affirm the order below on the ground that the appeal is premature and the questions raised are so insubstantial as not to need further argument.

The essential facts at issue in this case – like those raised in the State's appeal from the same underlying order (Case No. 09-416 (Jurisdiction Statement filed Oct. 5, 2009)) – are undisputed. There is no serious dispute that California prisons fail to provide even minimally adequate health care – there are too few clinical facilities to screen and treat the vast number of prisoners who need care, too few medical and mental health beds to house prisoners in crisis, too few primary care doctors and mental health professionals to treat ill prisoners, too few medical or mental health specialists to meet the needs of the overwhelming number of prisoners who need such care, too few custody officers to escort prisoners to medical or mental health visits, completely overwhelmed medication delivery systems and record keeping systems, and textbook breeding grounds for outbreaks of infectious diseases and for mentally ill prisoners to decompensate. State App. 141a-142a. Despite the escalating need for care, there are so many prisoners that the prison staff is simply unable to identify medical emergencies, much less respond appropriately. State App. 104a-112a. As a result, the three-judge court found that the serious medical and mental health needs of prisoners are unmet or are mistreated, and prisoners are becoming sick and dying at an alarming rate. State App. 141a-142a. Neither defendant-intervenors (referred to herein as "intervenors") nor the State appellants claim that any of these findings are error.

To the contrary, Governor Arnold Schwarzenegger declared a State of Emergency because the severe prison crowding "has caused substantial risk to the health and safety of the men and women who work inside these prisons and the inmates housed in them" making prisons places of "extreme peril to the safety of persons." App. 2a, 14a. He declared that overcrowding causes "increased, substantial risk for transmission of infectious illness;" that "thousands of gallons of sewage spills and environmental contamination" result from overloading the prisons' sewage and wastewater systems; that crowding causes serious security risks; and that the suicide rate in the 29 most crowded prisons "[was] approaching an average of one per week." App. 2a, 3a, 10a. The Governor underscored that "immediate action is necessary to prevent death and harm caused by California's severe prison overcrowding." App. 12a.

In the words of one of intervenors' experts, "the necessary constitutional medical and mental health services can't be provided with today's overcrowding." Trial Tr. 2202:4-6.

Nonetheless, the three-judge court did not order the State to reduce its prison population immediately. Instead, it issued an order requiring the State to submit a plan to reduce its prison population gradually. The State has submitted such a plan, (11/12/09 State Plan (*Plata* Docket 2274-1)), and all parties – including intervenors – now have an opportunity to comment on such plan. *See* 11/18/09 Order Inviting Responses (*Plata* Docket 2275).

The overwhelming evidence from plaintiffs' experts, the State defendants and their experts, and

intervenors and their experts, is that the measures by which the State proposes to reduce the prison population will not adversely impact public safety, and may improve public safety. *See, e.g.*, Trial Tr. 1995:8-20 (State's public safety expert); Trial Tr. 33044:7-9, 3045:5-12 (Law Enforcement Intervenors' closing argument); Trial Tr. 3022:24-3023:11 (District Attorney Intervenors' closing argument); Trial Tr. 3063:10-24 (San Mateo County Intervenors' closing argument); Trial Tr. 1007:21-1008:4 (Intervenor San Diego County Deputy District Attorney); Trial Tr. 1052:4-13 (Intervenor Stanislaus County Chief Probation Officer); Powers Report § III (same); Trial Tr. 2771:4-10 (Intervenor Yolo County Chief Probation Officer); Bennett Report ¶¶ 56-79 (Intervenor Sonoma County corrections expert); Bennett Supp. Report at 5-6 (same); Dumanis Trial Decl. ¶¶ 16-20 (*Plata* Docket 1711) (Intervenor San Diego District Attorney); Dalton Trial Decl. ¶¶ 17-25 (*Plata* Docket 1745) (Intervenor Los Angeles County Sheriffs' Department, Director of Bureau of Operations for Bureau of Offender Programs and Services); Buddress Trial Decl. ¶ 3 ((*Plata* Docket 1698) (Intervenor San Mateo County Chief Probation Officer); Trial Tr. 2012:20-25 (former Secretary of Corrections in Pennsylvania, Washington state and Maine); Trial Tr. 2106:8-2107:14 (member of State's "expert panel" on prisons); Krisberg Report at 4-12; Austin 8/15/08 Report, Austin 8/27/08 Report, and Austin 9/25/08 Report (member of State's "expert panel" on prisons).

Notwithstanding the wealth of uncontested evidence supporting the three-judge court's findings, intervenors' appeal raises purely factual disputes with the findings. Intervenors do not raise a single

question of law, and do not identify any splits of authority between the circuits. This Court should find that it lacks jurisdiction over the matter because the appeal is premature. In the alternative, if the Court notes probable jurisdiction, it is patent that the issues on appeal are not substantial questions requiring this Court's plenary review, and the decision below should be summarily affirmed.

JURISDICTION

Intervenors, like the State appellants in Case No. 09-416, invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1253 only by misstating the nature and import of the August 4, 2009 order on appeal.

Intervenors variously call the August 4 order on appeal a "prisoner release order" or a "mass release order." Intervenors' Jurisdictional Statement ("Int. J.S.") 5. In actuality, the August 4 order requires nothing more than that the State develop a plan, in consultation with all parties, that will gradually reduce its prison population. State App. 255a-256a. The court specifically stated that in developing its plan, the State "would not be required to throw open the doors of its prisons, but could instead choose among many different options or combinations of options for reducing the prison population." State App. 173a-174a. And indeed, on November 12, 2009, the State submitted a plan that would reduce the prison population using methods such as providing good time credits to prisoners to slightly shorten length of stay in prison; diverting low-level, low-risk offenders and parole violators who clog crowded prison reception centers (*see, e.g., Johnson v. California*, 543 U.S. 499, 502-503 (2005)) but spend very short periods of time in prison; increasing

county-level rehabilitative programming to reduce the number of offenders coming to prison in the first place; and building new prison facilities or transferring some California prisoners to out-of-state or federal custody. *See* 11/12/09 State Plan (*Plata* Docket 2274-1).

All parties, including intervenors, now have an opportunity to comment on the State's population reduction plan, 11/18/09 Order Inviting Responses (*Plata* Docket 2275), and the three-judge court may hold further proceedings to determine the appropriate scope of any final order requiring a reduction in the prison population. State App. 256a.

For the reasons discussed in appellees' Motion to Dismiss or Affirm in Case No. 09-416 (at 7-9), this Court lacks jurisdiction over this premature appeal, and prudential concerns counsel against noting probable jurisdiction or granting plenary review.

If this Court declines to note probable jurisdiction or grant plenary review now, intervenors and the State will have another opportunity to appeal once the three-judge court issues its final order. Appellees will support expedited briefing on any such appeal.

STATEMENT OF THE CASE

A statement of the facts and procedural history of the case on appeal is set forth in appellees' Joint Motion to Dismiss or Affirm in Case No. 09-416, at 1-7.

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

Intervenors' appeal solely disputes the three-judge court's findings of fact and does not present substantial questions requiring this Court's plenary review. If the Court does not dismiss the appeal for want of jurisdiction, the Court should summarily affirm the August 4 order.

I. The Three-Judge Court Did Not Clearly Err When It Found That Crowding Is The "Primary Cause" Of The Constitutional Violations And That "No Other Relief" Would Remedy the Violations.

Intervenors' arguments with respect to "primary cause" and "no other relief" are based on the false premise that the three-judge court excluded and refused to consider relevant evidence. Int. J.S. 8-9. Neither allegation finds any support in the record.

A. The Three-Judge Court's Decision Was Based On Evidence About Current And Ongoing Prison Conditions.

1. Intervenors contend that the three-judge court "simply assumed that constitutional violations identified years prior to issuance of the Prisoner Release Order continued unabated, and refused to permit evidence at trial to the contrary." Int. J.S. 5. The opposite is true; voluminous evidence of current conditions was admitted and considered. Intervenors, like the State, fail to identify a *single item of evidence that was offered but excluded.*

Intervenors' argument rests on the three-judge court's correct holding that it had no authority to

decide the underlying question regarding constitutionality, and so would not hear evidence *solely* relevant to that question. Int. J.S. 5.[1] But it is undisputed that the parties introduced and the court analyzed voluminous evidence about conditions in the prisons as of August 31, 2008 – six weeks before trial – which was relevant to plaintiffs' contention that overcrowding is the primary cause of the violations and that no other relief will remedy the violations.

Intervenors argue that they and the State were prevented from providing "evidence regarding massive increases in spending and the allocation of resources," which, according to intervenors, resulted "in substantial overall improvements in care." Int. J.S. 9.[2] In fact, key State officials in charge of

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[1] Intervenors do not take issue with the three-judge court's conclusion that it had no authority to make a determination whether the underlying conditions are constitutional. State App. 77a-78a. Under the PLRA, the proceedings in the three-judge court were solely about whether to enter a prisoner release order to remedy the ongoing constitutional violations that the single judge courts had found to exist. 18 U.S.C. § 3626(a)(3)(E). The questions whether there is a constitutional violation in the first place, whether there is still an ongoing constitutional violation after the passage of time, and whether prospective relief should be maintained or terminated, are questions reserved to the single judge district courts. 18 U.S.C. § 3626(a), (b), (c).

[2] Intervenors' claim that they would have introduced current evidence but for the three-judge court's ruling defies the record. In fact, intervenors admitted before trial that "Counsel for all Defendant Intervenors have conferred and believe that they will have a very limited role" in the proceedings relating to whether crowding is the primary cause of the constitutional

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prisons and prison medical and mental health care presented exhaustive testimony about the increases in health care expenditures and about the current conditions in the prisons, including the current level of crowding, current health care statistics, current medical and mental health care staffing levels, current medication management problems, and current data about suicides and other deaths. *See, e.g.*, Exhs. D-1000 - D-1002, D-1004 - D-1008, D-1233, D-1149, D-1259-1, D-1235-2, Trial Tr. 1272:12-21, 836-944, 1891-1940, 1668-1709, 1734-1772, 755-823, 724-754, Brewer Dep. 135:5-138:5.

Furthermore, the State's medical and mental health experts toured the prisons multiple times, including only weeks before trial; viewed the medical facilities; interviewed medical personnel and other prison staff, as well as prisoners; and reported and testified about the conditions they found. *See* Exhs. D-1016, D-1017, D-1019, State App. 82a, D-1020; Trial Tr. 1071-1143, 1191-1253.[3]

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violations. 11/13/08 Def.-Intervenors' Joint Opposition to Mot. for Reconsideration at 6 (*Plata* Docket 1792). That would have been the appropriate time to introduce evidence about current conditions, but the only witness intervenors presented on this question was a single State legislator with no personal knowledge of current conditions. *See* Runner Trial Decl. (*Plata* Docket 1658).

[3] Plaintiffs' medical and mental health experts, too, toured the prisons in the weeks prior to trial, and provided exhaustive testimony about current deficiencies in the medical and mental health care systems. Stewart Supp. Report; Haney 8/15/08 Report; Shansky 2nd Supp. Report.

The State also introduced into the record reports of the neutral court-appointed Receiver and Special Master, which include extensive discussion of current conditions in the prisons. *See, e.g.*, Exhs. D-1087 - D-1100, State App. 150a, D-1106, D-1224-1231, D-1110 - D-1112, D-1292, State App. 41a, D-1293, D-1294, D-1108, State App. 49a.

Moreover, numerous correctional officers from around the State testified about conditions they recently observed in the prisons. *See, e.g.*, Trial Tr. 509:18-510:6, 519:2-12 (too many prisoners with medical needs for the amount of health care space and health care staff at prison); Trial Tr. 575:10-577:5 (dangerously inadequate housing for suicidal prisoners); Trial Tr. 601:1-13 ("way too many inmates" for treatment space at prison); Trial Tr. 664:6-16 (describing treatment room that is shared simultaneously by the scheduling secretary and practitioners doing exams, including eye exams in the dark and hemorrhoid exams); Trial Tr. 663:22-664:5 (describing how patient intakes are done in hallways); Trial Tr. 661:19-662:1, 665:12-666:3, 671:21-25 (not enough staff to monitor provision of insulin and narcotics, or to double-check medication distribution); Trial Tr. 662:24-663:8; 668:15-23 (staff are overwhelmed by the number of patients and simply do not have the time or the resources to distribute medications properly; serious mistakes occur); Trial Tr. 691:2-4, 693:15-21 (prison too crowded to effectively monitor for medical conditions, especially in buildings with triple bunks).

Thus, far from being "stale" (Int. J.S. 9), the evidence on which the three-judge court based its decision was fully current and comprehensive.

2. Intervenors claim that the "the current nature of any constitutional violations should have affected the three-judge court's determination as to the scope of the order . . ." Int. J.S. 9. That is precisely what occurred.[4] The court's determination was firmly grounded in the current conditions. *See, e.g.*, State App. 86a-92a (August 4 order describes currently crowded conditions at prison reception centers, and how that crowding currently prevents provision of adequate health care), 97a-100a (describing current shortage of beds for mentally ill prisoners, and the impact of such shortage on provision of mental health care), 113a-114a (describing current inadequacies in medical management systems within prisons, and the resulting increased acuity of illness), 92a-95a (describing current severe shortage of treatment space in prisons, and how that shortage results in inadequate health care), 101a-102a (describing how current crowded conditions increase risk of spread of infectious diseases), 103a (describing how current crowded conditions are "toxic" to mentally ill prisoners), 105a-112a (describing current shortages

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[4] Intervenors claim that the three-judge court's analysis focused on "'whether . . . requiring a reduction in the population of California's prisons was necessary to remedy the previously identified constitutional violations[.]'" Int. J.S. 8 (quoting State App. 77a). In fact that quote from the August 4 order is a description of the analysis conducted by the *single judge courts* in determining the necessity for convening a three-judge court. State App. 77a. The three judge court's analysis focused on the evidence presented at trial – including the defendants' own expert testimony – demonstrating that crowding is the primary cause of the current deficiencies in health care, and must be reduced if the violations are to be remedied.

in medical, mental health and custodial staff, and the impact of such shortages on health care), 116a-118a (describing current problems with lockdowns preventing access to care), 121a-123a (current evidence regarding crowding causing increasing acuity of mental illness).

Only after canvassing the evidence regarding ongoing violations in the prisons did the three-judge court find that crowding is the primary cause of the violations, and that no other relief will provide a remedy. "The crushing inmate population has strained already severely limited space resources to the breaking point, and crowding is causing an increasing demand for medical and mental health care services, a demand with which defendants are simply unable to keep pace." State App. 140a; 141a-142a.

Neither the State nor intervenors contest this factual finding, or any of the subsidiary findings upon which it is based.

Having failed to identify a *single* item of evidence that was offered but excluded, and having failed to acknowledge the plethora of evidence about current conditions or the three-judge court's well-supported findings with respect to that evidence, intervenors' claim that the three-judge court improperly excluded evidence about current conditions must be rejected.

B. The Three-Judge Court Properly Considered Reports Of The Plata Receiver, The Coleman Special Master, And The Experts

Intervenors next claim that the court "ignored" evidence from the court-appointed Receiver and

Special Master showing that a prisoner release order was not necessary. Int. J.S. 9. To the contrary, the court carefully considered all of the reports of the Receiver and Special Master in reaching its conclusion. *See, e.g.*, State App. 155a-159a.

Intervenors quote out-of-context excerpts from an out-of-court talk given by the Receiver, and from that scant evidence argue that the Receiver admitted that California "*could* provide constitutional levels of care regardless of population." Int. J.S. 9-10 (emphasis added). Taken in context, the Receiver's comment plainly refers only to the Receivership's improved ability to employ medical professionals (in non-rural prisons) because the Receivership is able to pay full market rates for their services. Spitzer Decl., Exh. D at minutes 28:19-31:29. In the very next breath, however, the Receiver identifies serious problems created by overcrowding "because frankly everything in the prisons is made more difficult by overcrowding . . . . I have absolutely no doubt that the conditions of overcrowding, by itself, contributes to greater morbidity." *Id.*

More importantly, and entirely omitted from intervenors' brief, is that the Receiver has submitted numerous thoughtful, detailed reports to the court, all of which demonstrate that crowding must be resolved if the Receiver's efforts are to provide any timely remedy for the ongoing violations.

On May 15, 2007 the Receiver filed with the court a report describing why overcrowding has "especially adverse consequences concerning the delivery of medical, mental health and dental care." Exh. P-26 at 1, State App. 26a. He proclaimed that "failure is not an option" and that his remedial efforts

would remedy the violations "over time," but he also made it clear that overcrowding will significantly delay a long overdue remedy, and cause serious injury through the spread of infectious and communicable diseases. *Id.* at 30, 41-42.

One month later, in June 2007, the Receiver filed with the court a supplemental report identifying changes that the CDCR made in the intervening weeks which clearly demonstrated that overcrowding-related problems "are now assuming a size, scope and frequency that will clearly extend the timeframes and costs of the receivership and may render adequate medical care impossible, especially for patients who require longer term chronic care." Exh. P-27 at 10; *See also* Exh. P-55 at 1 (Receiver states "[i]t will not be possible to raise access to, and quality of, medical care to constitutional levels with overpopulation at its current levels."), 11/3/08 Order at 12 (*Plata* Docket 1757) (granting judicial notice).

The Receiver's reports to the court in the following years have demonstrated that crowding is indeed causing deficiencies in care, and that "adequate care cannot be provided for the current number of inmates at existing prisons." State App. 155a-156a (citing Exh. D-1133 at 27-28 (Receiver's June 6, 2008 Turnaround Plan of Action), State App. 93a. For example:

- The Receiver's January 15, 2009 Tenth Tri-Annual Report states that overcrowding-related crises significantly slow Receiver's work. *Plata* Docket 2011-2 at 3, 110-111. "Instead of working to save lives and implementing cost cutting initiatives, the Receiver has been forced to utilize

his limited resources to 'put out fires' created by the State." *Id.* at 3.

- The Receiver's Sept. 15, 2008 Ninth Quarterly Report states: "The progress which has been made to date will be for naught unless we are able to make permanent improvements to CDCR's facilities. Right now, the facilities are simply inadequate, given CDCR's population, to sustain for the long-term the improvements we are seeing." Exh. D-1100 at 80, State App. 150a.

- The Receiver's Ninth Quarterly Report also notes that medical care problems at an out-of-state prison housing California prisoners "had a serious negative impact on the Office of the Receiver, drawing clinical personnel away [from] other important projects and delaying 'in-state' remedial efforts. In essence ... valuable clinical hours have been devoted to helping a private prison ... rework its medical delivery system ... in order to keep the out of state transfer process from collapsing." *Id.* at 49.

- The Receiver's June 16, 2008 Eighth Quarterly Report states that the healthcare system will remain inadequate and "prisoners will continue to die unnecessarily" so long as there continues to be a mismatch between the number of prisoners and the prison healthcare facilities. Exh. D-1099 at 46.

Thus, the three-judge court correctly found that "[a]lthough the CDCR and the Receiver have implemented a number of remedial programs as a result of the *Plata* and *Coleman* litigation, and defendants have sought in various ways to improve the medical and mental health care provided in

California's prisons, these efforts cannot succeed in the absence of a prisoner release order." State App. 145a. Intervenors do not claim that this finding was error.

Intervenors argue that the court "ignored" a statement by the *Coleman* Special Master that reducing the prison population would not, by itself, immediately remedy the violations. Int. J.S. 9-10. Far from ignoring it, the court quoted the very same Special Master report. State App. 157a-158a.[5] The court correctly found that while reducing the prison population "is not by itself a panacea," and the State will still need to provide "professionally sound" care, administer medications, etc. (steps as to which the Special Master can be of "significant assistance"), "the defendants cannot remedy the ongoing constitutional violations without significant relief from the overcrowded conditions." State App. 158a. Intervenors do not contest this finding.

Finally, intervenors claim that plaintiffs' expert Dr. Shansky testified that "California could provide constitutionally adequate care for more than 172,000

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[5] That the Special Master stated that crowding relief will not by itself resolve the constitutional deficiencies does not amount to an admission that "a prisoner release order was not necessary." Int. J.S. 9. To the contrary, it is an acknowledgement that an order will not be sufficient. Moreover, the *Coleman* Special Master has long acknowledged the catastrophic effects of overcrowding on the mental health care delivery system, and the need to reduce crowding. *See, e.g.*, Exh. P-35 at 16-17 ("Over the past 11-plus years, much has been achieved, and many of the achievements have succumbed to the inexorably rising tide of population, leaving behind growing frustration and despair"), State App. 41a.

inmates if other reforms were implemented." Int. J.S. 10 (citing Trial Tr. 491:19-492:08). In fact, while Dr. Shansky agreed to the hypothetical that the Receiver could "eventually" remedy the violations (Trial Tr. 492:1-4), he affirmed that it is not "foreseeable when that could be achieved absent a prisoner release order or a population cap of some sort." Trial Tr. 492:21-25. In Dr. Shansky's opinion, "crowding is the primary cause of the ongoing inadequate medical care in the CDCR system. Overcrowding is the one factor that negatively impacts almost every other matter that must be addressed to create a minimally adequate medical care delivery system for California's prisons." Shansky 2d Supp. Report ¶9; State App. 134a. Dr. Shansky also testified that overcrowding in the prisons significantly interferes with and detracts from efforts to improve medical care. Shansky 3d Supp. Report ¶ 3; Shansky Report ¶ 138 (unless overcrowding addressed, CDCR locked into "crisis response" approach where it can focus only on putting out "fires").

As the court correctly found, "'[r]educing the population in the system to a manageable level is the only way to create an environment in which other reform efforts, including strengthening medical management, hiring additional medical and custody staffing, and improving medical records and tracking systems, can take root in the foreseeable future.'" State App. 168a (quoting Dr. Shansky). Intervenors do not contest this finding.

C. The Three-Judge Court's Findings With Respect To "No Other Relief" Are Correct And Uncontested.

Intervenors' final contention with respect to the need for a prisoner release order is that the three-judge court did not adequately consider alternative remedies. On this point, too, the assertion is belied by the record.

The three-judge court did not hold, as intervenors assert, that "no alternative to a prisoner release order *existed*," Int. J.S. 10-11; it held that no relief other than a prisoner release order would *remedy the violations*. State App. 168a. It reached that conclusion only after exhaustively canvassing every alternative proposed by the State and intervenors. State App. 145a-168a.

Intervenors contend that the three-judge court "rejected a number of viable alternatives to a prisoner release order," Int. J.S. 11 n.9, but they name only two alternatives they consider "viable"–transferring prisoners out of state, and transferring inmates to federal custody. *Id.* As the court noted, transferring inmates out of state, "if ordered by the court, would fall within the PLRA's definition of a prisoner release order, because it 'directs the release [of inmates] from . . . *a* prison.'" State App. 159a n.58 (quoting 18 U.S.C. § 3626(g)(4)). The same is true for transfers to federal custody. Thus, transferring prisoners to other institutions is one means by which the State could reduce its prison population pursuant to a prisoner release order; it is not an *alternative* to a prisoner release order. Indeed, the State's population reduction plan

incorporates precisely these measures. State App. 325a-327a.

Intervenors do not identify any other alternatives that they contend should have been considered by the court, nor do they contest *any* of the three-judge court's findings rejecting the alternatives to a prisoner release order that were proposed by the State. State App. 145a-168a.

The three-judge court found that prison construction was not a viable alternative to a prisoner release order because the construction proposed by the State would take so long to complete that it could not hope to remedy the violations that every day threaten the lives and health of prisoners. State App. 145a-154a. No party claims that this was error.[6]

The three-judge court found that simply hiring more medical, mental health, and custodial staff is not a viable alternative because, despite extensive efforts over many years, there has been a "serious and ongoing difficulty in filling vacant positions," State App. 154a, "working conditions for such personnel in California's overcrowded prisons are uninviting, and many potential staff members are unwilling to work under them," *id.*, and "[e]ven if staff could be hired, they would have almost nowhere

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[6] In a separate proceeding, the State has contended that the courts have no power to order construction projects. *Plata v. Schwarzenegger*, No. 09-15864 (9th Cir.) (State's opening brief filed July 31, 2009, reply brief filed Sept. 10, 2009, oral argument held Sept. 16, 2009). Accordingly, the State cannot contend that construction is appropriate "relief" short of a prisoner release order that the court could have issued.

to work because CDCR's facilities lack the physical space required to provide medical and mental health care." State App. 154a-155a. No party claims that these finding were error.

The three-judge court further found that the *Plata* Receivership and *Coleman* Special Mastership, while necessary, will not be able to remedy the violations in the absence of a prisoner release order. State App. 156a-158a. "[A] reduction in the present crowding of the California prisons is necessary if the efforts of the *Plata* Receiver and the *Coleman* Special Master to bring the medical and mental health care in California's prisons into constitutional compliance are ever to succeed. In the absence of a prisoner release order, all other remedial efforts will inevitably fail." State App. 158a-159a.

Indeed, the former head of the California prison system affirmed that "without addressing the issue of overcrowding, the Department of Corrections will never be able to provide appropriate medical or mental healthcare and . . . sustain any kind of quality constitutionally-adequate medical or mental healthcare." Trial Tr. 385:6-10. Neither the State nor intervenors contest this, or cite any evidence to the contrary.

Overwhelming evidence supports the three-judge courts' findings with respect to "primary cause" and "no other relief," and intervenors' factual contentions regarding these matters fail to present a substantial question requiring this Court's review. The order below should be summarily affirmed.

II. The Order Below Provides The Least Intrusive Means To Remedy The Constitutional Violations, And Is Narrowly Tailored.

1. Intervenors' primary argument regarding remedy is that the three-judge court's August 4 order is not narrowly tailored because the court "refused to hear evidence" about current conditions. Int. J.S. 12. However, as already noted, intervenors fail to identify even a single item of evidence that the court "refused to hear," and in fact the court admitted copious evidence regarding current conditions. *Supra* at 6-9. The contention must fail.

2. Intervenors next argue that the "prisoner release order" is overbroad because non-class members may benefit from a population reduction order. Int. J.S. 12-13. Intervenors cite *Missouri v. Jenkins*, 515 U.S. 70, 98 (1995) for the general proposition that any relief must be aimed at eliminating constitutional violations. Int. J.S. 12. That is precisely the situation here: the overwhelming number of prisoners results in the violations; an order to reduce crowding is necessary to remedy the violations; hence, such an order is by definition narrowly tailored to that result. The three-judge court correctly found that a "systemwide remedy is appropriate" here because "the constitutional violations identified by the *Plata* and *Coleman* courts exist throughout the California prison system and are the result of systemic failures in the California prison system." State App. 171a; *see also Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 463-465 (1979); *Lewis v. Casey*, 518 U.S. 343, 357 (1996).

Intervenors do not contest this finding, but appear to suggest that the only appropriate systemwide relief would be an order to release class members. But in accordance with this Court's mandates in *Bounds v. Smith*, 430 U.S. 817 (1977) and *Lewis*, 518 U.S. 343, the three-judge court did not require any specific remedy, but instead deferred to the State to propose a remedial plan in the first instance. State App. 172a-173a. The State made a reasonable policy choice to reduce the population by targeting low-risk prisoners, some of whom are class members and some of whom are not. 11/12/09 State Plan (*Plata* Docket 2274-1); State App. 343a. Consistent with *Bounds* and *Lewis*, the three-judge court may approve the State's plan, even if it incidentally benefits non-class members. *See, e.g., Davis v. Bd. of School Comm'rs of Mobile Cty.*, 402 U.S. 33, 37 (1971) (approving structural reforms that may impact class members and non-class members); *Columbus Bd. of Educ.*, 443 U.S. 449 (same).

Intervenors' suggestion that the court must eschew the State's proposed remedial plan and impose upon the State an order that reduces the prison population by other means finds no support in the law. In any event, intervenors' suggestion is premature because the court has not yet ruled on any objections to the State's plan.

3. Intervenors next argue that the August 4 order is not narrowly tailored because it is not "focus[ed] directly and exclusively on medical and mental health issues such as staffing ratios, equipment and facilities, and record keeping." Int. J.S. 13. It is unclear what intervenors intend by this argument, but it appears to be their contention that "other

relief" – such as orders to hire more staff, build more facilities, or improve record keeping – would remedy the violations, dressed up with a slightly different label. But the three-judge court considered and rejected such an argument, State App. 145a-168a, and intervenors do not contend that to be error.

Indeed, the *Plata* and *Coleman* courts have collectively issued scores of orders directed at the matters suggested by intervenors, and other specific medical and mental health care problems, to no avail. State App. 13a-69a. The reason that none of those orders have succeeded in remedying the problem is overcrowding.

The three judge court found that "'[t]he limitations on the CDCR, including staffing, administrative resources and especially treatment space, are so severe that the only avenue for building a constitutional health care delivery system is to reduce the demand on the system by lowering the number of patients its serves.'" State App. 164a (quoting Dr. Shansky). Even intervenors' expert agreed that "the necessary constitutional medical and mental health services can't be provided with today's overcrowding." Trial Tr. 2202:4-6. Thus, the court correctly found, "Other forms of relief [other than reducing the prison population] are either unrealistic or depend upon a reduction in prison overcrowding for their success." State App. 168a. Intervenors do not contest that conclusion.

Accordingly, since a reduction in the prison population is *necessary* to remedy the violations, it is certainly "narrowly tailored" to that result.

4. Finally, intervenors contend that the three-judge court provided insufficient justification for

setting the population cap at 137.5% of design capacity. Int. J.S. 14. That contention lacks merit, as explained in Plaintiffs' Motion to Dismiss or Affirm in the State's appeal, Case No. 09-416, at 25-27. Intervenors also claim that the three-judge court entered its order "without any provision for limiting continued population reduction in the event constitutional violations have been resolved at a higher population level." Int. J.S. 14. In fact, the three-judge court specifically retained jurisdiction "to consider any subsequent modifications [to the population reduction plan] made necessary by changed circumstances." State App. 256a. Under the PLRA, any injunctive relief, including a prisoner release order, may be modified or terminated if the constitutional violations are remedied. *See* 18 U.S.C. § 3626(b)(1), (4). Accordingly, the three-judge court's order will not be inflexibly applied in the absence of a constitutional violation.

III. Intervenors' Arguments Regarding Public Safety Are Misplaced.

The PLRA requires that courts considering granting any prospective relief in prison cases "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." 18 U.S.C. § 3626(a)(1)(A). Congress well understood that circumstances might exist where the law compels a court to issue a prisoner release order notwithstanding its adverse impact on public safety. "While prison caps must be the remedy of last resort, a court still retains the power to order this remedy despite its intrusive nature and harmful consequences to the public if, but only if, it is truly necessary to prevent an actual

violation of a prisoner's federal rights." H.R. Rep. No. 104-21, § 301, at 25 (1995).

Nonetheless, the three-judge court correctly found that the State can devise a safe plan that will reduce the prison population without adversely impacting public safety. State App. 185a-188a, 192a-193a.

Intervenors conceded in the proceedings below that measures exist by which the state can reduce the prison population without adversely impacting public safety. *See, e.g.*, Trial Tr. 3044:7-9, 3045:5-12 (Law Enforcement Intervenors' closing argument); Trial Tr. 3022:24-3023:11 (District Attorney Intervenors' closing argument); Trial Tr. 3063:10-24 (San Mateo County Intervenors' closing argument); Trial Tr. 1007:21-1008:4 (Intervenor San Diego County Deputy District Attorney); Trial Tr. 1052:4-13 (Intervenor Stanislaus County Chief Probation Officer); Powers Report § III (same); Trial Tr. 2771:4-10 (Intervenor Yolo County Chief Probation Officer); Bennett Report ¶¶ 56-79 (Intervenor Sonoma County corrections expert); Bennett Supp. Report at 5-6 (same); Dumanis Trial Decl. ¶¶ 16-20 (*Plata* Docket 1711) (Intervenor San Diego District Attorney); Dalton Trial Decl. ¶¶ 17-27 (*Plata* Docket 1745) (Intervenor Los Angeles County Sheriffs' Department, Director of Bureau of Operations for Bureau of Offender Programs and Services); Buddress Trial Decl. ¶ 3 (*Plata* Docket 1698) (Intervenor San Mateo County Chief Probation

Officer). The State's expert likewise agreed. Trial Tr. 1995:8-20 (defendants' public safety expert).[7]

The three-judge court found that "[t]here was overwhelming agreement among experts for plaintiffs, defendants, and defendant-intervenors that it is 'absolutely' possible to reduce the prison population in California safely and effectively." State App. 192a-193a (quoting intervenor expert). Intervenors do not claim this finding was error.

The court did not order the State to implement any particular population reduction measure; it gave the State the opportunity to design and submit a population reduction plan in the first instance. State App. 172a-175a. Nonetheless, the court conducted a detailed examination of the safe population-reduction measures that enjoyed near-universal support among the parties, and which the State has incorporated

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[7] Plaintiffs' experts, too, opined that the State can reduce its prison population without adversely impacting public safety. Trial Tr. 2012:20-25 (former Secretary of Corrections in Pennsylvania, Washington state and Maine); Trial Tr. 2106:8-2107:14 (member of State's expert panel); Krisberg Report at 4-12 (same); Austin 8/15/08 Report, Austin 8/27/08 Report, and Austin 9/25/08 Report (member of State's expert panel). Indeed, they demonstrated that dozens of jurisdictions throughout the country, including many within California, have reduced prison and jail populations without *any* resulting impact on crime rates. Trial Tr. 2103:20-2105:21; 2107:15-2108:17; 2108:19-2109:1, 2110:6-2111:8, 2111:10-21, 2112:17-20 (Dr. Krisberg). Moreover, this case is unusual in that most of plaintiffs' experts on the public safety issues are individuals previously hired by the state of California as leading correctional experts. Exh. P-2 at n (members of State's expert panel); Woodford Report (former acting Secretary of CDCR), State App. 55a.

into its population reduction plan. State App. 192a-220a; 11/12/09 State Plan (*Plata* Docket 2274-1).

A. The Three-Judge Court Correctly Found That There Are Numerous Means To Safely Reduce The Prison Population.

1. *Good Time Credits.* The three-judge court found that the State could safely reduce its prison population by providing additional "good time" credits to prisoners for conforming conduct and for participation in work programs and education programs. State App. 196a-204a. These types of credits have long been used as an "early release" mechanism in California and other jurisdictions, without adverse impact on public safety. State App. 196a.

Two separate State expert panels have already proposed reducing the prison population by expanding good time credits (Exh. P-2 at 12, Exh. E, 92-93 (expert panel report), State App. 55a; Exh. P-4 at 122, 130 (Deukmejian Report), State App. 54a), as did all independent experts who testified in this case, including experts for intervenors. Bennett Report ¶ 79; Bennett Supp. Report at 1; *see also* Cogbill Trial Decl. ¶ 12 (*Plata* Docket 1676) (Intervenor Sonoma County Sheriff-Coroner agreeing with Bennett); Trial Tr. 1015:21-1016:2 (Intervenor San Diego Deputy District Attorney: good time credits are "a better way" of reducing the prison population); Buddress Trial Decl. ¶ 5 (*Plata* Docket 1698) (Intervenor San Mateo County Chief Probation Officer supports early release as incentive for nonviolent behavior in prisons).

The three-judge court correctly found that expanding good time credits does not change prisoners' recidivism rates, and thus changing the date of release impacts the timing and circumstances of crime, but not the likelihood that it will occur. State App. 200a-204a. Intervenors' Jurisdictional Statement now contests this finding, Int. J.S. 17, but individual intervenors themselves readily conceded the fact during the proceedings below.[8]

All other public safety experts for both the State and plaintiffs also support the court's finding that granting more good time credits will not increase crime. *See* Trial Tr. 1995:21-24, 1997:8-18

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[8] *See, e.g.*, Trial Tr. 1154:4-8, 1154:18-1155:7 (Intervenor Stanislaus County Chief Probation Officer confirms that early release merely changes the time and circumstances of crime, but it would not change the statistical likelihood of crime taking place); Trial Tr. 3017:16-3019:18 (District Attorney Intervenors' closing argument); Trial Tr. 1826:7-1827:14 (Intervenor Los Angeles County Sheriff's Lieutenant); Buddress Trial Decl. ¶ 5 (*Plata* Docket 1698) (Intervenor San Mateo County Chief Probation Officer); *see also* Trial Tr. 2318:3-14 2319:1-23 (Intervenor City of Fresno Chief of Police); Amended Dyer Report ¶ 18 (*Plata* Docket No. 1937) (intervenor assumes no change in recidivism rate from increased good time credits); Munks Trial Decl. ¶ 4 (same); Trial Tr. 2452:5-2453:4 (Intervenor Director of Mental Health Department for Santa Clara) (same); Meyer Trial Decl. ¶¶ 29-30 (*Plata* Docket 1733) (same); 12/18/08 Stip. Regarding Testimony of Michael James ¶ 2(c) (*Plata* Docket 1967) (same); Bay Trial Decl. at 3 (*Plata* Docket 1698) (San Mateo County Director of Department of Housing) (same); Trial Tr. 2653:2-15 (Los Angeles County Sheriff's Department Chief of Correctional Services concedes that any threat from releasing prisoners, without having provided rehabilitative programs, exists regardless of whether prisoners are released early or late).

(defendants' public safety expert); Trial Tr. 1325:8-16, 1329:8-19 (former head of corrections in California); Krisberg Report at 5-11 (former member of expert panel who reviewed data from early release studies in nine U.S states, City of Philadelphia, and Canada and found that early released inmates had same or lower recidivism rates than other inmates); Trial Tr. 2102:2-2105:21 (Dr. Krisberg); Trial Tr. 1569:11-20 (Pennsylvania Secretary of Corrections).

Indeed, the court correctly found that because good time credits incentivize good behavior, awarding such credits will likely reduce recidivism. State App. 203a. State officials and other experts agree. *See, e.g.*, Trial Tr. 1724:6-21 (CDCR Undersecretary of Programs); Trial Tr. 1552:19-1554:3 (Pennsylvania corrections chief); Trial Tr. 1387:16-18.

2. *Diverting Technical Parole Violators.* The trial court also found that the State could safely reduce its prison population by diverting technical parole violators. State App. 209a, 204a-208a. Intervenors do not contest this finding.

Technical parole violators are individuals who have violated the terms of their parole, but have not been convicted of a new offense. State App. 204a-205a. "In California, more than 70,000 parolees are returned to prison each year for technical parole violations," State App. 204a, and those individuals spend an average of four months or less in prison (usually reception centers, where they receive no rehabilitative programs) before being returned to the community on parole. Trial Tr. 211:2-23; Trial Tr. 1316:7-1317:11; Austin 8/15/08 Report ¶ 55.

This system of revocation and return to prison is often referred to as "churning" of parolees, and it is

undisputed that such churning endangers public safety because it is destabilizing and breaks parolees' ties to the community, including their families, homes, jobs, and substance abuse programs. State App. 205a.

Diversion of technical parole violators is supported by many intervenors, and not opposed by others.[9] Moreover, diversion of a portion of the state's technical parole violators has long enjoyed the support of the Governor, key State prison officials, and the State's Expert Panel. Pls.' Exh. P-328 at 178 (Governor proposal), State App. 207a; Exh. P-2 at 47-49, Appx. A at 77-79, Appx. E at 88-89 (State's expert panel report), State App. 55a; Exh. P-113 at 75-91 (Governor's Strike Team Report), State App. 189a;

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[9] *See, e.g.*, Trial Tr. 3063:10-24 (San Mateo County Intervenors' closing argument); Buddress Trial Decl. ¶¶ 3-5, 12 (*Plata* Docket 1698) (Intervenor San Mateo County Chief Probation Officer) (support); Trial Tr. 1156:3-12 (Intervenor Stanislaus County Chief Probation Officer) (support); Amended Dalton Trial Decl. ¶ 33-35 (*Plata* Docket 1745) (Intervenor Los Angeles County Sheriffs' Department, Director of Bureau of Operations for Bureau of Offender Programs and Services) (proposing diversion of technical parole violators); Trial Tr. 2385:15-2386:7 (Intervenor Riverside County District Attorney) (may support diversion, depending on what alternative sanctions are proposed); Trial Tr. 2727:14-2728:5 (Intervenor Republican State legislator recommending reducing prison population through parole reform and stating he has introduced legislation to create intermediate sanctions for parole violations); Bennett Report ¶¶ 68-71 (Intervenor expert recommending reform of parole revocation policy including the use of a variety of sanctions); Bennett Supp. Report at 1 (supporting "the principal incarceration and supervision reforms advanced by Plaintiffs").

Exh. P-3 at 31 (California Little Hoover Commission), State App. 53a; Exh. P-4 at 122, 144-155 (Deukmejian Report), State App. 54a; Hoffman Trial Aff. ¶¶ 18-25 (*Plata* Docket 1633) (State parole chief); Exh. D-1306; Trial Tr. 1993:6-14 (State's public safety expert).

Current and former heads of four state correctional systems also agree that California should reduce its prison population by diverting technical parole violators. Woodford Supp. Report ¶¶ 31-32 (former head of corrections in California); Lehman Report ¶¶ 12-13 (former head of corrections in Pennsylvania, Maine and Washington); Trial Tr. 1571:6-1572:15 (current head of Pennsylvania corrections).

3. *Diverting Low Risk Offenders With Little Time to Serve.* The three-judge court further found that the prison population could be safely reduced by diverting certain low-risk offenders from prison. State App. 210a-214a. Intervenors do not contest the finding that such a program could be implemented without adversely impacting public safety.

Indeed, some intervenors, and intervenors' independent expert, themselves recommend that the state consider "broadening the target range for prison diversion under state sentencing guidelines." Bennett Report ¶ 79.[10]

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[10] *See also* Bennett Supp. Report at 1 (supporting "the principal incarceration and supervision reforms advanced by Plaintiffs"); Trial Tr. 3044:7-8, 3045:5-12 (Law Enforcement Intervenors' closing argument); Cogbill Trial Decl. ¶ 12 (*Plata* Docket 1676) (Intervenor Sonoma County Sheriff supports

(continued)

Similarly, the State has long supported such diversion plans as a safe means to reduce the prison population. *See, e.g.*, Exh. P-780 at 18 (Governor's proposal to convert crimes to misdemeanors, so offenders do not go to prison), State App. 197a. This proposal is in line with the testimony of the State's experts. Trial Tr. 1087:4-22 (State expert recommends diversion as a "very reasonable strategy"). One former head of California prisons also affirmed that it would be appropriate to divert some low-risk prisoners because "California incarcerates many more prisoners than is necessary for the safety of the public" and intermediate sanctions are appropriate for some offenders. Woodford Supp. Report ¶ 32.

4. *Expanded Rehabilitation Programs.* Finally, the three-judge court found that expanding rehabilitative programs, particularly within communities, would reduce the prison population without adversely affecting public safety. State App. 214a-216a.

This population reduction method is overwhelmingly supported by intervenors.[11]

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reforms recommended by Bennett); Trial Tr. 2368:9-2369:12 (intervenor recommends population reduction through diversion, and arguing that if done right it could improve public safety); Dumanis Trial Decl. ¶¶ 18-20 (*Plata* Docket 1711) (Intervenor San Diego District Attorney, President of the California District Attorneys Association); James Trial Decl. ¶ 20 (*Plata* Docket 1728) (Intervenor Orange County Assistant Sheriff).

[11] *See, e.g.*, Exh. D-1329 at 103-104 (testimony of Intervenor Chief Probation Officer of San Mateo County); Trial Tr. 990:17-

(continued)

The Chief Probation Officer of Stanislaus County and the president of the Chief Probation Officers of California testified that providing rehabilitative programs to probationers in local communities would reduce the prison population by 20,000 to 25,000 prisoners. Powers Report at 6.

B. Intervenors' Complaints About The Three Judge Court's Methodology And Findings Are Misplaced.

1. Intervenors find it "inexplicabl[e]" that the court did not order the State to implement the measures (such as rehabilitative programs, or use of a risk assessment instrument) that it had found to be safe. Int. J.S. 15. Yet intervenors do not address – much less contest – the three-judge court's conclusion that it must defer to the State's proposed population reduction measures, consistent with this Court's decisions in *Bounds v. Smith*, 430 U.S. 817, 832-833 (1977) and *Lewis v. Casey*, 518 U.S. 343, 361-363 (1996). State App. 172a-173a. Intervenors fail to

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995:3 (representative of Intervenor San Diego County Deputy District Attorney); Rodriguez Trial Decl. ¶ 21 (*Plata* Docket 1713) (representative of Intervenor San Diego District Attorney); Conklin Trial Decl. ¶¶ 17-24 (*Plata* Docket 1659) (witness for Intervenor San Diego County Sheriffs Department); Trial Tr. 1159:14-1160:17, 1162:18-1163:6 (Intervenor Stanislaus County Chief Probation Officer); Buddress Trial Decl. ¶¶ 3, 8, 10, 11, 13 (*Plata* Docket 1698) (Intervenor San Mateo County Chief Probation Officer); Bennett Report ¶ 59-71 (expert for Intervenor Sonoma county); Trial Tr. 2325:9-12 (Intervenor Fresno Police Chief); Trial Tr. 2383:17-2384:14 (Intervenor Riverside County District Attorney); Trial Tr. 2652:14-16 (Intervenor Los Angeles County Sherriff's Department Chief of Correctional Services).

present any argument to support a different approach.[12]

Intervenors next contend, incongruously, that the three-judge court "admits, as it must, that its order cannot be implemented without compromising public safety." Int. J.S. 15. The three-judge court, however, said just the opposite: that means exist by which the state can reduce its prison population without compromising public safety. State App. 187a-188a. The excerpt that intervenors cite is merely a footnote stating that there is insufficient space inside the prisons for in-prison rehabilitative programming. State App. 215a n.80. But the lack of sufficient space for such programs inside prison says nothing of the ability to safely award good time credits, safely divert certain parolees and low-risk prisoners, and safely provide programming in the communities, and it does not alter the court's ultimate conclusion.

2. Intervenors complain that the court erred when it "disregarded" opinions of certain intervenor witnesses that the court found to be not credible. Int. J.S. 16. This Court has long cautioned that findings "based on determinations regarding the credibility of witnesses" demand great deference. *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985). Indeed, where a trial court's credibility determination "is based on [its] decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not

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[12] In any event, the court has yet to issue a final "prisoner release order," and it is still unclear whether intervenors' preferred programs will be implemented by the State.

contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Id.* Intervenors offer no argument to justify disturbing this rule of deference.

In any event, the findings that intervenors contest are well supported. The three-judge court properly considered warnings issued by witnesses who "objected to simply throwing open the prison doors and releasing inmates in a generic manner;" as the court correctly found, those warnings were unfounded because such a remedy would not be "contemplated or ordered by the court." State App. 193a-194a; *see also* State App. 220a-222a, 233a-234a, 246a-248a. And indeed, the State's population reduction plan contemplates a gradual reduction of the prison population using well-accepted, safe methods.

Intervenors claim hyperbolically that by failing to heed their warnings the three-judge court has "virtually assure[d] that . . . crime will spike in California as a result of the Prisoner Release Order." Int. J.S. 17. There is no support in the record for such a claim. There is, however, ample support in the record for the opposite conclusion. Dozens of jurisdictions throughout California and the nation have implemented prison population reductions; none have experienced an increase in recidivism or crime. Trial Tr. 2103:20-2105:5-21; 2107:15-2108:17; 2108:19-2109:1, 2110:6-2111:8, 2111:10-21, 2112:17-20 (Dr. Krisberg).

Similarly, historical data shows that there is no relationship between the crime rate and the incarceration rate. Austin 8/15/08 Report ¶¶ 19-26; Trial Tr. 2160:20-2162:7 (Dr. Krisberg); *see also* Exh.

P-842, Trial Tr. 2815, 2842 (historical data in California establishes that there has been no relationship between increasing numbers of parolees in the community and crime rates).

Intervenors' contention that the three-judge court erred by "disregarding" their evidence on public safety is further undermined by the gross distortions in their own witnesses' testimony. A chief complaint expressed by intervenors at trial was that any reduction in the prison population would adversely impact their county criminal justice systems; but intervenors were forced to concede that their fears were overstated. For example, one Sheriff intervenor declared that a reduction in the prison population would cause his crowded jail to overflow, and that it would cost millions of dollars to transfer hundreds of jail inmates to other county jails; but he later admitted that his methodology for reaching those figures was flawed. Trial Tr. 1794:19-22. In fact, his jail is not overcrowded – it is running well below capacity, Trial Tr. 1791:6-12, and no jail inmates would need to be sent out of county, because the number of new arrests from parolees would not even fill the current facility.

Another intervenor similarly testified that a prison population reduction would overwhelm his jail system, but he was forced to admit at trial that the county jails are well below capacity (Trial Tr. 2272:1-6 (Graves); Exh. P-841, Trial Tr. 2272-73), and that the county has closed down some jail beds and rented other jail beds to nearby counties (Trial Tr. 2276:5-18).

Still another intervenor testified that a reduction in the prison population would result in an increase

in the average daily population of his county jail (Christianson Trial Decl. ¶¶ 23, 26 (*Plata* Docket 1727)), but then admitted that he had no idea how he reached the conclusion about the increase in the jail population – his staff came up with the number via a methodology he did not understand. Trial Tr. 2677:7-2680:7; *see also* James Trial Decl. ¶ 33 (*Plata* Docket 1728) (Intervenor Orange County Assistant Sheriff) (similar exaggeration).

Yet another intervenor admitted that her estimate of the cost to the county from a prison population reduction were wildly overblown, in one instance by a factor of more than twenty. Stip. Regarding Testimony of Beverly Beasley Johnson ¶¶ 6-8 (*Plata* Docket 1922); *see also* Trial Tr. 1819:15-1830:3, 1830:21-1831:23 (Intervenor Los Angeles County Sherriff's Lieutenant Stephen Smith exaggerating the impact on LA county jails); Pacheco Trial Decl. ¶¶ 18, 21-22 (*Plata* Docket 1706) (Intervenor Riverside County District Attorney exaggerating the impact of a prison population reduction by assuming that the State would return parolees to the county all at once, not gradually over a 2-year period); Ryan Trial Decl. ¶¶ 26-27 (*Plata* Docket 1726); Trial Tr. 2706:21-2707:5 (Intervenor Amador County Sheriff exaggerating the impact of a population reduction on prosecutors' ability to try cases). These are but a sampling of the myriad inaccuracies and exaggerations marring Intervenors' trial testimony.

The three-judge district court carefully reviewed the testimony and evidence presented by intervenors, State defendants, and plaintiffs, and correctly concluded that the evidence "overwhelmingly showed

that there are ways for California to reduce its prison population without [] an adverse impact, and that a less crowded prison system would in fact benefit public safety and the proper operation of the criminal justice system." State App. 248a-249a. Intervenors fail to demonstrate any error.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in appellees' Motion to Dismiss or Affirm in Case No. 09-416, the appeal should be dismissed or the order below should be affirmed.

Respectfully submitted,

Michael Bien
Jane E. Kahn
Ernest Galvan
Amy Whelan
Lisa Ells
ROSEN, BIEN & GALVAN, LLP
315 Montgomery St., 10th Fl.
San Francisco, CA 94104

Donald Specter
Counsel of Record
Steve Fama
Alison Hardy
Sara Norman
Rebekah Evenson
PRISON LAW OFFICE
1917 Fifth Street
Berkeley, CA 94710
(510) 280-2621

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IN THE

Supreme Court of the United States

CALIFORNIA STATE REPUBLICAN LEGISLATOR INTERVENORS, *et al.*,
Appellants,

v.

MARCIANO PLATA AND RALPH COLEMAN, *et al.*,
Appellees.

On Appeal From an Order of the Three-Judge Court in the United States District Courts for the Northern District of California and the Eastern District of California

RESPONSE TO MOTIONS TO DISMISS OR AFFIRM

ROD PACHECO
District Attorney,
County of Riverside
WILLIAM E. MITCHELL
Assistant District Attorney
ALAN D. TATE
Senior Deputy District Attorney
4075 Main Street, 1st Floor
Riverside, CA 92501
(951) 955-5484

Counsel for Appellants District Attorney Intervenors

STEVEN S. KAUFHOLD *
CHAD A. STEGEMAN
AKIN GUMP STRAUSS HAUER & FELD LLP
580 California Street
Suite 1500
San Francisco, CA 94104
(415) 765-9500

Counsel for Appellants Republican Assembly and Senate Intervenors

* Counsel of Record

[Additional Counsel Listed On Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

BOTH SANZ 38

17893 116

MARTIN J. MAYER
KIMBERLY HALL BARLOW
IVY M. TSAI
JONES & MAYER
3777 North Harbor Blvd.
Fullerton, CA 92835
(714) 446-1400

Counsel for Appellants Sheriff, Chief Probation Officer, Police Chief, and Corrections Intervenors

December 22, 2009

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	2
I. THE PRISONER RELEASE ORDER SHOULD NOT HAVE BEEN ISSUED BECAUSE THERE WAS NO SHOWING THAT PAST VIOLATIONS WERE CURRENT AND ONGOING AND BECAUSE ALTERNATIVE REMEDIES EXISTED	3
II. THE PRISONER RELEASE ORDER FAILS TO SATISFY THE PLRA'S REQUIREMENT THAT ANY SUCH RELIEF BE BOTH NARROWLY DRAWN AND THE LEAST INTRUSIVE MEANS TO REMEDY VIOLATION OF THE FEDERAL RIGHT.	8
III. THE PRISONER RELEASE ORDER VIOLATES THE PLRA BECAUSE IT NOT ONLY FAILS TO GIVE SUBSTANTIAL WEIGHT TO ANY ADVERSE IMPACT ON PUBLIC SAFETY, IT AFFIRMATIVELY THREATENS PUBLIC SAFETY.	11
CONCLUSION	12

TABLE OF AUTHORITIES

CASES Page

Hines v. Anderson, 547 F.3d 915 (8th Cir. 2008) 9

STATUTES

18 U.S.C. § 3626 ..... *passim*

OTHER AUTHORITY

H.R. Rep. No. 104-21 (1995) 7

INTRODUCTION

This appeal challenges the first prisoner release order made over a defendant's objection since the enactment of the Prison Litigation Reform Act, 18 U.S.C. § 3626 ("PLRA"). The Prisoner Release Order mandates the release or non-incarceration of approximately 46,000 inmates in the California prison system over the next two years. The order is unprecedented in scope and magnitude and gravely threatens public safety in California.

Appellants' (hereinafter "Appellant-Intervenors") Jurisdictional Statement presented substantial questions regarding the basis for the Prisoner Release Order and identified a series of legal errors committed by the three-judge court below. Specifically, the court misapplied the "primary cause" analysis by simply assuming that overcrowding was the primary cause of ongoing constitutional violations while barring evidence and argument to show the absence of such alleged violations. Second, the court found there was no alternative to a prisoner release order notwithstanding compelling evidence to the contrary from its own Receiver and others. Third, the court found the 46,000-inmate Prisoner Release Order to be narrowly-tailored despite the fact that the vast majority of inmates benefitting from such an order would not be class members. Fourth, the court failed to give substantial weight to public safety in issuing the Prisoner Release Order.

In response, Appellees and the Appellee-Intervenor claim the questions presented are not substantial, that the appeal is premature and that

the decision below should be summarily affirmed. They are wrong on all three claims.[1]

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The legal questions presented are substantial because the system-wide Prisoner Release Order remains unnecessary and imposes an unacceptable level of risk to public safety in California. Under the PLRA, federal courts may issue release orders only under the most limited of circumstances. The PLRA serves to protect the ability of states to operate and maintain their own criminal justice systems and preserves traditional notions of federalism as they relate to the protection of public safety.

The Prisoner Release Order issued below specifically raises legal questions relating to (1) interpretation of the PLRA's requirement that overcrowding must be shown to be the "primary cause" of constitutional violations; (2) interpretation of the PLRA's requirement that no alternative to a release order exists and that any such order must be narrowly tailored; and (3) interpretation of the PLRA's requirement that substantial weight must be given to public safety in the consideration of any release order. As set forth in the Jurisdictional Statement, each of these questions alone is sufficiently

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[1] Appellees and the Appellee-Intervenor assert that this appeal is premature because the court's order merely imposes a population cap and that the State develop a population reduction plan. Appellees' Motion at 1, 4; Appellee-Intervenor's Motion at 13. These arguments are disingenuous, and Appellant-Intervenors agree with and incorporate by reference, the State's comments on this topic at section 1 pages 2-4 of its Brief Opposing Joint Motion to Dismiss or Affirm, filed in Case No. 09-416. The appeal is ripe for adjudication by this Court.

substantial to necessitate the notation of probable jurisdiction by the Court and nothing in Appellees' or Appellee-Intervenor's Motions to Dismiss or Affirm changes that fact.[2]

I. THE PRISONER RELEASE ORDER SHOULD NOT HAVE BEEN ISSUED BECAUSE THERE WAS NO SHOWING THAT PAST VIOLATIONS WERE CURRENT AND ONGOING AND BECAUSE ALTERNATIVE REMEDIES EXISTED.

Under the PLRA, a three-judge court "shall enter a prisoner release order only if the court finds by clear and convincing evidence that – (i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E).

The Prisoner Release Order issued below failed to meet either of these requirements. First, notwithstanding the fact that the PLRA is written in the present tense and permits issuance of prospective prisoner release orders only to correct current and ongoing violations of Federal rights, the three-judge court precluded the introduction of evidence and argument on the issue of whether past violations remained "current and ongoing" at the time of the trial. App. 78a n.42; *see also* App. 77a. Instead, the three-judge court simply assumed the continuation of "the previously identified constitutional violations[.]" App. 77a.[3] This was error, particularly in light of the

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[2] Appellant-Intervenors address the Appellee-Intervenor's Motion only to the extent it directly addresses the substantial issues raised by the Jurisdictional Statement.

[3] Appellees' claim that "[t]he court's determination was firmly grounded in the current conditions," Appellees' Motion at 10, is

fact that the last determination that any violation existed was already over two years old at the time the Prisoner Release Order was issued on August 4, 2009, and the determination was itself based on evidentiary hearings conducted on September 13, 1995 (*Coleman*), and June 9, 2005 (*Plata*). *See* App. 23a, 33a.

In response, Appellees assert that "Intervenors do not take issue with the three-judge court's conclusion that it had no authority to make a determination whether the underlying conditions are constitutional." Appellees' Motion at 7, n. 1. This assertion is simply wrong and unsupported by the record. Indeed, the Appellant-Intervenors maintained throughout the proceeding below that the three-judge court not only had the authority to make such a determination, but indeed that it is a necessary part of the "primary cause" analysis under the PLRA for the three-judge court to determine whether previously-identified constitutional violations remain current and ongoing. Legislator Intervenors' Trial Brief at 8-9 (E.D. Cal./N.D. Cal. Nov. 3, 2008) (*Coleman* Docket No. 3263; *Plata* Docket No. 1760); Trial Tr. at 57:11-17 (E.D. Cal./N.D. Cal. Nov. 18, 2008) (*Coleman* Docket No. 3541.2; *Plata* Docket No. 1829).

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belied by the court's stated resolution not to make any independent determination of current unconstitutionality. The court's refusal to do so presents a question of law for this Court. This is particularly troubling given statements by the court's own Receiver specifically indicating he can bring the prison system into constitutional compliance, evidence regarding efforts being made by the Receiver to do so over several years, yet the court refusing to allow discovery on the Receiver. *See infra* at 6-7.

It remains uncontested that the three-judge court plainly refused to make a determination regarding whether any current constitutional violations existed at the time that it issued the Prisoner Release Order. App. 78a n.42; Pre-Trial Hr'g Tr. at 28:16-29:2 (E.D. Cal./N.D. Cal. Nov. 10, 2008) (*Coleman* Docket No. 3541.1; *Plata* Docket No. 1786); Trial Tr. at 6:24-7:9 (E.D. Cal./N.D. Cal. Nov. 18, 2008) (*Coleman* Docket No. 3541.2; *Plata* Docket No. 1829). Appellees instead claim that the Appellant-Intervenors fail to identify a single item of evidence that was offered but excluded. Appellees' Motion at 6, 11. Appellees omit that when the Legislator-Intervenor's counsel attempted to raise the issue at trial and describe the evidence that the Appellant-Intervenors would offer, the court forcefully refused to consider such evidence and confirmed its view that the record had been made on the issue. Trial Tr. at 57:11-58:13 (E.D. Cal./N.D. Cal. Nov. 18, 2008) (*Coleman* Docket No. 3541.2; *Plata* Docket No. 1829) ("Twice this court has said we will not receive that evidence [of the absence of current constitutional violations]. You have made as clear a record as you can.") This refusal – whether based on perceived lack of authority or for some other reason – violated the PLRA, which requires a timely determination that overcrowding is the primary cause of current constitutional violations, not a determination that overcrowding may have caused violations some time in the past.

Second, a prisoner release order may issue only if a plaintiff demonstrates – by clear and convincing evidence – that "no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E). At trial, the Appellant-Intervenors introduced evidence of alternatives to a prisoner release order, including the alternative of permitting

the court-appointed Receiver to continue his work in the California prison system. Trial Tr. at 2382:15-2386:7, 2465:11-2466:24 (E.D. Cal./N.D. Cal. Dec. 12, 2008) (*Coleman* Docket No. 3541.12; *Plata* Docket No. 1939). Most importantly, however, they introduced compelling evidence from the court's Receiver that is simply impossible to reconcile with the three-judge court's conclusion that a release order was necessary and that no alternative existed.

Specifically, the *Plata* Receiver stated that under his control, the California prison systems could provide constitutional levels of care regardless of population. He stated in a public address that "I'm just not seeing difficulty in providing medical services no matter what the population is." Trial Declaration of Assemblymember Todd Spitzer, ¶ 28 and Exhibit D thereto, at 30:00 minutes (E.D. Cal./N.D. Cal. Oct. 30, 2008) (*Coleman* Docket No. 3173; *Plata* Docket No. 1656). The Receiver continued, stating "we believe we can provide constitutional levels of care no matter what the population is." *Id.* at 31:20 minutes.

Appellees seek to diminish the significance of the Receiver evidence as "out-of-context excerpts from an out-of-court talk given by the Receiver. . . ." Appellees' Motion at 12. As a preliminary matter, the parties were limited to "out-of-court" evidence because the three-judge court refused to permit discovery on the Receiver and refused to have him testify in court. *See* Protective Order re Deposition of Receiver (E.D. Cal./N.D. Cal. Nov. 29, 2007) (*Coleman* Docket No. 2577; *Plata* Docket No. 988). Moreover, the evidence was not taken out of context as the Legislator-Intervenors provided the three-judge court and all parties with the full recording of the Receiver's statements. Trial Declaration of

Assemblymember Todd Spitzer, ¶ 28 and Exhibit D thereto, (E.D. Cal./N.D. Cal. Oct. 30, 2008) (*Coleman* Docket No. 3173; *Plata* Docket No. 1656). Finally, Appellees' citation to additional statements by the Receiver that "because frankly everything in the prisons is made more difficult by overcrowding . . . . I have no doubt that the conditions of overcrowding, by itself, contributes to greater morbidity," (*id.*) does not diminish the viability of continuing the Receiver's work or justify issuance of the Prisoner Release Order. Even if crowded conditions make alternative relief "more difficult," that does not mean that alternatives do not exist. The Receiver's unqualified statement that his office is capable of providing constitutional levels of care "no matter what the population is," (*id.*) underscores this point.

Congress intended a prisoner release order be "the remedy of last resort." H.R.Rep. No. 104-21, at 25 (1995). Here, the Prisoner Release Order was issued notwithstanding compelling evidence from the person in the best position to know – the current Receiver – that constitutional levels of care can be provided without a release order. Accordingly, the Prisoner Release Order fails to comply with the PLRA's requirement that such release orders may be issued only when "no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E).[4]

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[4] In addition to continuing the work of the Receiver and Special Master, defendants and the Appellant-Intervenors offered evidence of other alternative remedies to correct any constitutional violations including, but not limited to increased hiring of medical, mental health and custodial staff, increased construction of facilities and full implementation of AB 900 (bi-partisan legislative authorizing billions of dollars in increased

II. THE PRISONER RELEASE ORDER FAILS TO SATISFY THE PLRA'S REQUIREMENT THAT ANY SUCH RELIEF BE BOTH NARROWLY DRAWN AND THE LEAST INTRUSIVE MEANS TO REMEDY VIOLATION OF THE FEDERAL RIGHT.

Any prisoner release order issued pursuant to the PLRA is valid only if the order "is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3826(a)(1)(A). The Prisoner Release Order here fails to meet this requirement in four separate respects.

First, the three-judge court refused to consider whether previously-identified constitutional violations

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resources for the California prison system). Trial Tr. at 1678:10-1680:17 (E.D. Cal./N.D. Cal. Dec. 10, 2008) (*Coleman* Docket No. 3541.9; *Plata* Docket No. 1920); Trial Tr. at 1892: 14- 1911:1 (E.D. Cal./N.D. Cal. Dec. 11, 2008) (*Coleman* Docket No. 3541.10; *Plata* Docket No. 1929); Trial Tr. at 2726:13-2735:8 (E.D. Cal./N.D. Cal. Dec. 22, 2008) (*Coleman* Docket No. 3541.14; *Plata* Docket No. 1972). With respect to the prison transfers to out-of-state or federal custody, Appellees claim that these alternatives constitute prisoner release orders because they would direct the release of inmates from *a* prison. Appellees' Motion at 17. This argument ignores the fact that any such transferred inmates would remain in custody. Finally, Appellees assert incorrectly that the Appellant-Intervenors "do not contest *any* of the three-judge court's findings rejecting the alternatives to a prisoner release order that were proposed by the State." Appellees' Motion at 18 (emphasis in original). On the contrary, the Appellant-Intervenors believe that the three-judge court improperly rejected a number of viable alternatives including increased hiring, increased construction of facilities and continuance of the work of the Receiver and Special Master among other alternatives.

existed at the time of trial and the scope of such violations, if any. Nor did the three-judge court endeavor to determine which, if any, of the 33 facilities within the California prison system currently fail to provide constitutional levels of care. The result is an overbroad and overreaching release order that fails to adequately address current conditions.

Second, under 18 U.S.C. § 3826(a)(1)(A) any relief must "extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." *See Hines v. Anderson*, 547 F.3d 915, 922 (8th Cir. 2008) (affirming dismissal of an order under the PLRA that was not tailored to the specific violation at issue because it addressed medical conditions generally rather than "a particular medical issue that existed at the time."). Appellees fail to cite or distinguish *Hines* asserting instead that the Appellant-Intervenors do not contest the three-judge court's finding that a "systemwide remedy is appropriate." Appellees' Motion at 20. This is not so. The PLRA requires that any relief be targeted on current violations of the constitutional rights of "a particular plaintiff or plaintiffs." 18 U.S.C. § 3826(a)(1)(A). Accordingly, no basis exists for a systemwide release order that goes far beyond what is necessary to address current violations of the rights of specific class members, if any.

Third, under the PLRA, a narrowly-tailored order would focus directly and exclusively on medical and mental health issues such as staffing ratios, equipment and facilities, and record-keeping. Appellees respond by asserting incorrectly that the Appellant-Intervenors do not contest a conclusion of the three-judge court that "[o]ther forms of relief

[other than reducing the prison population] are either unrealistic or depend upon a reduction in prison overcrowding for their success." Appellees' Motion at 22. Not only do the Appellant-Intervenors contest the conclusion that a release order is necessary to provide constitutional levels of care, that view is supported by the court's own Receiver who stated plainly his ability to provide constitutional care "no matter what the population is." Spitzer Trial Decl., *supra*, ¶ 28 and Exhibit D, at 30:00 minutes (E.D. Cal./N.D. Cal. Oct. 30, 2008) (*Coleman* Docket No. 3173; *Plata* Docket No. 1656); *see also id.* at 31:20 minutes ("We believe we can provide constitutional levels of care no matter what the population is.")

Fourth, the Prisoner Release Order sets a mandatory population cap of 137.5% of the correctional system's "design capacity" over two years regardless of whether any alleged constitutional violations are abated. Appellees offer assurances that this overbreadth presents no issue because the three-judge court retained jurisdiction "to consider any modifications [to the population reduction plan] made necessary by changed circumstances." Appellees' Motion at 23. This assurance clashes directly with the three-judge court's determination that it lacked authority to determine whether any constitutional violations continued at the time of trial and Appellees' assertion that issues including "whether prospective relief should be maintained or terminated, are questions reserved to the single judge district courts." Appellees' Motion at 7. For this reason as well, it is crucial that the overbreadth of the release order be addressed at this time.

III. THE PRISONER RELEASE ORDER VIOLATES THE PLRA BECAUSE IT NOT ONLY FAILS TO GIVE SUBSTANTIAL WEIGHT TO ANY ADVERSE IMPACT ON PUBLIC SAFETY, IT AFFIRMATIVELY THREATENS PUBLIC SAFETY.

Appellees acknowledge, as they must, that Congress intended release orders as "the remedy of last resort." However, they fail to grasp the impact that the release of 46,000 prisoners would have on public safety in California. Instead, they assert that it is hypothetically possible to reduce prison population without adversely impacting public safety. Appellees' Motion at 24.

However, the issue is not whether it is metaphysically possible to reduce prison population in some minimal amount and maintain safety, the question is whether substantial weight has been given to the adverse impact on public safety that will result from the release of 46,000 inmates. No release order of this magnitude has previously been ordered, much less implemented safely. Tellingly, neither the three-judge court nor the Appellees address these realities in defending the largest Prisoner Release Order in this country's history.

CONCLUSION

The Court should note probable jurisdiction, reverse the determination of the three-judge court, and remand for further proceedings in accordance with guidance from this Court.

Respectfully submitted,

ROD PACHECO
District Attorney,
County of Riverside
WILLIAM E. MITCHELL
Assistant District Attorney
ALAN D. TATE
Senior Deputy District Attorney
4075 Main Street, 1st Floor
Riverside, CA 92501
(951) 955-5484

Counsel for Appellants District Attorney Intervenors

STEVEN S. KAUFHOLD *
CHAD A. STEGEMAN
AKIN GUMP STRAUSS HAUER & FELD LLP
580 California Street
Suite 1500
San Francisco, CA 94104
(415) 765-9500

Counsel for Appellants Republican Assembly and Senate Intervenors

MARTIN J. MAYER
KIMBERLY HALL BARLOW
IVY M. TSAI
JONES & MAYER
3777 North Harbor Blvd.
Fullerton, CA 92835
(714) 446-1400

Counsel for Appellants Sheriff, Chief Probation Officer, Police Chief, and Corrections Intervenors

* Counsel of Record

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